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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

HOBBS *v.* AUSTRALIAN PRESS ASSOCIATION AND OTHERS.

C. A.
1932
June 20, 22.

[1931. H. 884.]

Practice—Service of Writ—Partnership Firm carrying on Business in England and Australia—Plaintiff unaware of Business being carried on in England—Order for Service out of Jurisdiction—Service on one of Partners in Australia—Validity—Rules of Supreme Court, Order XI.; *Order* XLVIII.A, *r.* 3.

An action was brought by the plaintiff against the A. P. Association, W. & M. and B. for damages for alleged libel contained in The Argus (Melbourne) newspaper. The paper was published in Melbourne, Australia, and also in Fleet Street, London. W. & M., a firm consisting of eight partners, were the proprietors of the paper and carried on business in Melbourne. All the defendants were British subjects. On an application by the plaintiff leave was granted by Humphreys J. under Order XI., r. 1 (*ee*), to serve W. & M. out of the jurisdiction. At that time it was not known to the plaintiff that W. & M. also carried on business within the jurisdiction. Service was effected on one of the partners of the firm in Melbourne. On an application by W. & M. to set aside the order for service out of the jurisdiction on the ground that they also had a place of business within the jurisdiction, Charles J. discharged the order of Humphreys J.

On appeal:—

Held, that Order XI. and Order XLVIII.A must be read together, and that, provided leave under Order XI. was obtained, the writ could properly be served on the defendant firm out of the jurisdiction, and that such service bound the firm by the combined operation of Order XLVIII.A, r. 3, and Order XI.

Held, therefore, that the order of Humphreys J. was right and that the service was good although W. & M. were served in their firm name.

Decision of Charles J. reversed.

APPEAL of the plaintiff from an order of Charles J.

The following statement of the facts is taken from the judgment of Lord Hanworth M.R.:—

On March 6, 1931, a writ was issued at the suit of William Cooper Hobbs as plaintiff against the Australian Press Association, Wilson & Mackinnon and George Bell as defendants. The plaintiff's claim was for damages for libel contained in the issue of The Argus (Melbourne) dated March 11, 1925. An application was made for leave to serve the writ out of the jurisdiction upon an affidavit of the plaintiff's solicitor which contained these statements: "The above-named intended plaintiff is advised and believes that he has a good cause of action against the above-named intended defendants, for damages for libel published by the above-named intended defendants in The Argus (Melbourne) on 11th March, 1925. The said newspaper was published at The Argus Office, Collins Street, Melbourne, Australia, and also at 80 Fleet Street, in the City of London. The intended defendants, Australian Press Association, carry on business at 107 Fleet Street, in the City of London. The intended defendants, Wilson & Mackinnon, who are the proprietors of the said newspaper, carry on business at 365 Elizabeth Street, Melbourne, Australia, and the defendant, George Bell, who is the printer and publisher of the said newspaper, also carries on business at 365 Elizabeth Street, Melbourne, aforesaid. All the defendants are British subjects." In the statement that was made in para. 1, that the newspaper was published at 80 Fleet Street, the plaintiff showed that he brought himself within Order XI., r. 1 (*ee*). The action is founded on tort committed within the jurisdiction. The statement justified the case being treated as one within Order XI., which deals with service out of the jurisdiction. With regard to the first defendants upon the writ, they carried on business in the City of London: there was no difficulty about service. With regard to the second defendants, the case, being one which falls within Order XI., was one in respect of which the Court had jurisdiction to give leave to serve out of the jurisdiction. Those defendants, Wilson & Mackinnon, who were served in the firm name, appear on the note contained (as is required) upon the newspaper that is published as being the proprietors of the paper, and their address is given as 365 Elizabeth Street, Melbourne. Upon the materials, therefore, which are available upon the newspaper itself there was a justification for asking for leave to serve those defendants, Wilson & Mackinnon, out of the jurisdiction and at the place which in their own paper was given as their address. Upon that application an order was made on March 5, 1931, by Humphreys J. giving the plaintiff liberty to serve the partnership firm of Wilson & Mackinnon out of the jurisdiction; and, in accordance with the rules, the time limit for the appearance of the defendants was I think fixed at eighty-eight days after the service of the writ. The rest of the facts may be stated quite shortly. It appears that the writ in fact was served in Melbourne upon one of the partners of Wilson & Mackinnon on February 26, 1932, and, after I suppose conditional appearance, an application was made by those partners to Charles J. to discharge the order that had been made by Humphreys J. on the ground that the writ ought not to have been served out of the jurisdiction and that the service upon Wilson & Mackinnon was bad. The reason for that is stated to be this. They also apparently carry on business within the jurisdiction. Wilson & Mackinnon are proprietors of The Argus. The firm consists of eight partners: they carry on business at 365 Elizabeth Street, Melbourne; they have also a branch

C. A.
1932

HOBBS
v.
AUSTRALIAN
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office and carry on business at 80 Fleet Street in the City of London. We are told in answer to that affidavit that at the time when the writ was issued those who were acting for the plaintiff had no knowledge of the fact that Wilson & Mackinnon did carry on business within the jurisdiction; and upon the materials which apparently were then before them, such as a copy of the Melbourne Argus, there was no statement which indicated that they had a place of business within the City of London. Charles J. discharged the order, holding that the order ought not to have been made for service out of the jurisdiction, and the plaintiff now appeals to this Court.

The appeal was heard on June 22, 1932.

P. B. Morle for the appellant. It is common ground that the defendant firm is a firm carrying on business within the jurisdiction. The case is therefore one in which the partners may be sued in the name of the firm even if the partners are resident out of the jurisdiction. It is immaterial whether the writ is against an English firm or against a foreign or colonial firm so long as the firm is a firm which carries on business within the jurisdiction: *Worcester City and County Banking Co.* v. *Firbank, Pauling & Co.* (1) It follows that the order of Humphreys J. was right and ought not to have been discharged.

Then as to service. The defendants' contention is that as they carry on business within the jurisdiction they can only be served within the jurisdiction, and it is said that Order XLVIII.A, r. 3 (2), so provides. There is no justification for this limitation. Order XI. and Order XLVIII.A must be read together, and, provided leave be obtained under Order XI., the case is one to which that Order applies, then the writ can properly be served upon a partner out of the jurisdiction, and such service binds the firm by the combined operation of Order XLVIII.A, r. 3, and Order XI. It does not follow that because the firm are carrying on business within the jurisdiction that they have a place of business at which service could be effected within the jurisdiction, and even if they had there is nothing in r. 3 to exclude service out of the jurisdiction by leave under Order XI.: see per Lord Esher, *Worcester City and County Banking Co.* v. *Firbank, Pauling & Co.* (1)

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(1) [1894] 1 Q. B. 784.

(2) Order XLVIII.A, r. 3: "Where persons are sued as partners in the name of their firm under Rule (1), the writ shall be served either upon any one or more of the partners or at the principal place, within the jurisdiction, of the business of the partnership upon any person having at the time of service the control or management of the partnership business there; and, subject to these Rules, such service shall be deemed good service upon the firm so sued, whether any of the members thereof are out of the jurisdiction or not, and no leave to issue a writ against them shall be necessary: provided that in the case of a co-partnership which has been dissolved to the knowledge of the plaintiff before the commencement of the action, the writ of summons shall be served upon every person within the jurisdiction sought to be made liable."

[He was stopped.]

F. J. Tucker for the defendants Wilson & Mackinnon. The order of Humphreys J. ought not to have been made, in view of the fact that the firm have a place of business within the jurisdiction where service could have been effected, and there was no need, therefore, to serve the writ out of the jurisdiction. Order XLVIII.A, rr. 1 and 3, form a complete code regulating service on partners, and where partners have a place of business within the jurisdiction there is no jurisdiction to give leave to serve out of the jurisdiction. They must then be served in accordance with r. 3 within the jurisdiction. Order XLVIII.A, r. 1, was substituted for Order XVI., r. 14, of the 1883 Rules and Order XLVIII.A, r. 3, was substituted for Order IX., r. 6, of the 1883 Rules, and under these old rules it was held that you could not sue a foreign firm in the name of the firm or even with leave serve a partner out of the jurisdiction so as to bind the firm. If the plaintiff elects to sue the firm in the firm name under Order XLVIII.A, r. 1, he must also serve them under r. 3 within the jurisdiction and may not serve them out of the jurisdiction. [He cited *Russell* v. *Cambefort* (2); *Western National Bank of City of New York* v. *Perez, Triana & Co.* (3)]

[Lord Hanworth M.R. referred to *Lysaght, Ld.* v. *Clark & Co.* (4) and *Dobson* v. *Festi, Rasini & Co.* (5)]

(1) [1894] 1 Q. B. 784.
(2) (1889) 23 Q. B. D. 526.
(3) [1891] 1 Q. B. 304.
(4) [1891] 1 Q. B. 552.
(5) [1891] 2 Q. B. 92.

The new rules were made in the light of these authorities, which establish that you cannot sue partners in the firm name when they are resident out of the jurisdiction, and you cannot serve them out of the jurisdiction even with leave: *Dobson* v. *Festi, Rasini & Co.* (1)

P. B. Morle in reply. The plaintiff's solicitor's affidavit shows that he was not aware at the time of obtaining leave to serve the writ that the defendants Wilson & Mackinnon had a place of business within the jurisdiction as distinct from carrying on business within the jurisdiction. Whether there is a place of business or not is a question of fact, and the facts now deposed to by these defendants were not then known to him. Had they been it is not conceivable that recourse would have been had to Order XI. if it was clear that the writ could be effectively served without leave within the jurisdiction at the principal place of business. In any event the possibility of serving at the principal place does not oust the jurisdiction to grant leave to serve on partners out of the jurisdiction under Order XI. The decision in *Worcester City and County Banking Co.* v. *Firbank, Pauling & Co.* (2) shows that the firm name was properly used in this case, as the partners were carrying on business within the jurisdiction. When the name of a firm is used, it is only a convenient method of denoting those persons who compose the firm at the time when that name is used, and a plaintiff who sues partners in the name of their firm in truth sues them individually, just as much as if he had set out all their names (per Lindley L.J., *Western National Bank of City of New York* v. *Perez, Triana & Co.* (3)), and when they appear they have to do so individually in their own names both under the old rule Order XII., r. 15, and now under Order XLVIII.A, r. 5. It follows that in any event the service upon the partner in fact served was good service upon him, but such service under Order XLVIII.A, r. 3, was also good service upon the firm. The new rules were made as a result of Bowen L.J.'s suggestion in his judgment (4) as to the necessity of redrafting the rules under the Judicature Act so far as they affected partnerships. The judges who made the new rules were, as regards the use of the firm name, faced with the difference of opinion between Lord Esher and Bowen L.J. in the *Western Bank* case (1), Lord Esher's view being that the firm name could be used under Order XVI., r. 14, and Bowen L.J. doubting whether in the case of a foreign firm it could be so used, treating *Russell* v. *Cambefort* (2) as an authority that those rules had no application to a foreign partnership at all, even if the foreign partnership carried on business in this country. The new rules solved the difficulty by laying down as the test that to justify the use of the firm name the firm must carry on business within the jurisdiction, and the conflict of opinion was resolved by that qualification.

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(1) [1891] 2 Q. B. 92.
(2) [1894] 1 Q. B. 784.
(3) [1891] 1 Q. B. 304, 314.
(4) Ibid. 318.

Next as regards service. Lord Esher's view was that under Order IX., r. 6, where the writ was issued without leave and served upon a person temporarily within the jurisdiction as a partner, although the firm were not carrying on business in England then such service was good service on the firm. Lindley and Bowen L.JJ. thought that Order IX., r. 6, did not apply to the case of a foreign firm and that the service was not good service on the firm. Bowen L.J.'s view was that Order IX., r. 6, was not intended to cover writs directed against foreign firms none of whose partners were resident or domiciled in England notwithstanding that they might be carrying on business in England. Cave J. in *Lysaght, Ld.* v. *Clark & Co.* (3) thought that where the partners carried on business in England and one of them resided in England and the other abroad a writ could be served without leave on the partner in England and that such service was good service on the firm. The new rules indicate that the judges who made them adopted Lord Esher's view. There is nothing in r. 3 to require that in order that service upon a partner should bind the firm it must be service within the jurisdiction, all that is necessary for service out of the jurisdiction is that leave should be obtained under Order XI.; provided leave is obtained under Order XI. then service can be effected under r. 3 on a partner out of the jurisdiction, and such service binds the firm so long as the firm is a firm carrying on business within the jurisdiction.

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(1) [1891] 1 Q. B. 314.

(2) 23 Q. B. D. 526.

(3) [1891] 1 Q. B. 552.

For these reasons the authorities on the construction of Order XVI., r. 14, and Order IX., r. 6, are not reliable cases on the construction of the new rules. All that they can be used for is to indicate what were the views in conflict and help to show which of these views the new rules were intended to adopt.

Cur. adv. vult.

June 22. LORD HANWORTH M.R. [after stating the facts as above set out, continued :] I have stated the relevant facts. Obviously some comment may arise at the proper time as to the delay in the service of the writ. The leave to serve the writ out of the jurisdiction was given on March 5, 1931 : it was not in fact served until February 26, 1932, and the cause of action in respect of which the writ is issued was one which accrued on March 11, 1925. I mention those facts to show that I have not overlooked them, but, as I say, although at the appropriate time it may be necessary to inquire into the delay and possibly to ask for an explanation, they are in no sense material to nor do they govern, the principles on which the present appeal is based. Charles J. thought that the leave to issue the writ out of the jurisdiction ought not to have been given, inasmuch as the defendants Wilson & Mackinnon have a place of business within the jurisdiction. No point arises as to the defendant Bell, who since the issue of the writ has died, and the cause of action against him has abated.

The ground on which it was said to Charles J. that leave to serve out of the jurisdiction ought not to be given is the broad ground that Order XLVIII.A, which allows a writ to be issued in a firm name, does not apply in the case where it is necessary to obtain leave to serve out of the jurisdiction; in other words, that there is no interrelation between Order XLVIII.A and Order XI. The cases which are said to establish that are two or three to which I may shortly refer. The first is *Russell* v. *Cambefort* (1), in which it was held that a foreign partnership the members of which are foreigners and resident out of the jurisdiction, but carrying on business in this country, cannot be served under the then Order IX., r. 6, which provides for service on partners, either upon any one or more of them, or at the principal place of business within the jurisdiction. Broadly speaking, that decision was reached on the ground that some limitation must be given to the exercise of the powers over foreigners and that, although the rules have the force of a statute, it was not intended by Parliament to exercise jurisdiction over foreigners who were resident out of the jurisdiction.

The next case to which our attention was called was that of *Western National Bank of City of New York* v. *Perez, Triana & Co.* (2), where there was a divergence of opinion in the Court of Appeal between Lindley and Bowen L.JJ. on the one side, and Lord Esher on the other. It was there held that Order IX., r. 6, did not apply in the case of a foreign firm, that the service was not good service on the firm, but that a service on one of the partners individually would have been if he had been so named individually in the writ. The case is instructive as showing the divergence of opinion in the Court of Appeal, but it is to be observed that on the point which we have to consider Lindley L.J. said (3): "If one of those partners is out of the jurisdiction, the mode of proceeding against him under Order XI., and the necessity for proceeding against him under Order XI. exists, whether he is sued by name or as one of the firm under Order IX." That clearly indicates that in Lindley L.J.'s mind there was no insuperable difficulty in conceiving that a partner should be served by means of the facilities given under Order XI., although his adhesion to the writ was by virtue of his having been named in his partnership firm name. Bowen L.J. said (4): "The law as to suing and serving them will remain what it always has hitherto been, though the writ cannot, under Order IX., r. 6, be addressed against them in the foreign firm's name."

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(1) 23 Q. B. D. 526.
(2) [1891] 1 Q. B. 304.
(3) [1891] 1 Q. B. 314.
(4) Ibid. 316.

After that case had been decided, a case came before Cave J., of *Lysaght, Ld.* v. *Clark & Co.* (1), where a writ was issued against persons in the name of their firm. One partner was resident in England and one partner was outside England, and both were subjects of a foreign State. It was suggested that under *Russell* v. *Cambefort* (2) they could not be sued, but Cave J. said: "The limit put on the application of Order IX., r. 6"—namely, service on the partner —"was that it does not cover writs against a firm all the partners of which are resident abroad. We are now asked to go further and hold that the rule does not apply to a case of a firm carrying on business in England, some one or more of the partners of which are resident abroad." Cave J. held that the service was good, and to that extent he made some inroad or qualification upon *Russell* v. *Cambefort.* (2)

Then came the case of *Dobson* v. *Festi, Rasini & Co.* (3), where it was held that Order IX., r. 6, did not apply to a foreign partnership. There the partnership had neither place of business nor property within the jurisdiction, and all the partners resided out of the jurisdiction. That seems to be covered by *Russell* v. *Cambefort.* (2) But again Lindley L.J. said (4): "I consider this to be settled by *Russell* v. *Cambefort* (2) and *Western National Bank of City of New York* v. *Perez, Triana & Co.* (5) It is urged that this case is distinguishable, because in neither of those cases was there any leave to serve abroad under Order XI. That is true, but it does not seem to me to help the case if the firm does not appear." Kay L.J. said that there was no breach of contract within the jurisdiction, and therefore Order XI. did not apply in *Russell* v. *Cambefort* (2), and so on—again pointing out that in the mind of the Court there was apparently no necessary divergence or hostility

(1) [1891] 1 Q. B. 552, 555.
(2) 23 Q. B. D. 526.
(3) [1891] 2 Q. B. 92.
(4) Ibid. 94.
(5) [1891] 1 Q. B. 304.

to holding that there was an interrelation between the service on partners in a firm name and the service out of the jurisdiction.

Those cases were all decided before June of 1891. In June of 1891 the rules were altered, and took their present form. Their present form is this. Order XI. remains, enabling persons where there has been (as in the present case) a tort committed within the jurisdiction to serve the defendant out of the jurisdiction. Then comes Order XLVIII.A, which deals with actions against firms and persons carrying on business in names other than their own, and the rules are definitely altered from what they had been when the cases to which I referred were decided. Rule 1 of the Order says this: "Any two or more persons claiming or being liable as co-partners and carrying on business within the jurisdiction may sue or be sued in the name of the respective firms." Thus two conditions have to be fulfilled, that they are liable as co-partners and that the co-partnership carries on business within the jurisdiction. If so, the writ may be issued against them in the firm name. It is important to remember that that facility is given in order to assist plaintiffs to obtain their rights; it is not a rule which is made in the interest of defendants to prevent them from being brought before the Court; it is really to facilitate the action and the matters which have to be determined therein being brought properly before the Court. Then by r. 3 it is provided: "Where persons are sued as partners in the name of their firm under Rule (1.)"—that is where those two conditions to which I have referred are fulfilled—"the writ shall be served either upon any one or more of the partners or at the principal place, within the jurisdiction, of the business of the partnership upon any person having at the time of service the control or management of the partnership business there; and, subject to these Rules, such service shall be deemed good service upon the firm so sued, whether any of the members thereof are out of the jurisdiction or not, and no leave to issue a writ against them shall be necessary." It appears to me that that rule, as now drawn, is intended to indicate that if you have a service at the place of business then you are certainly not to inquire whether or not one or any of the members are out of the jurisdiction, and the fact that no leave to issue a writ against them shall be necessary indicates the interrelation of Order XI. with Order XLVIII.A; in other words, it appears that the rules have now become so framed that the difficulties in which the Court found itself in the cases to which I have referred have been overcome.

In *Worcester City and County Banking Co.* v. *Firbank, Pauling & Co.* (1) it is definitely held by the Court of Appeal that this Order XLVIIIA, r. 1, applies to all partnerships carrying on business within the jurisdiction. Therefore, a firm which carries on business within the jurisdiction may be sued in the firm name under that rule without leave, although it be a foreign or Colonial firm, the members of which are resident out of the jurisdiction. Lord Esher says (2) that it was for the purpose of getting rid of a hardship, to which he refers, that Order XLVIII.A was framed, and for the present purpose, although they were a Colonial firm, the defendants were to be treated as if they were a foreign firm. Then he comes to the question (3): "The next point is whether it was properly served. Under Order XLVIII.A, r. 3, the writ in such a case may be served upon any one or more of the partners in England. Another mode of service under that rule is by serving it at the principal place of business of the partnership." Davey L.J. says (4): "One of the partners was resident out of the jurisdiction when the writ was issued. A person out of the jurisdiction cannot be served with a writ except under Order XI. by leave of the Court or a judge. Therefore, clearly such partner could not have been personally served," and so on—quite clearly indicating once more that there is no contradiction of the use of Order XI. where the procedure offered under Order XLVIII.A is available and allowed.

For these reasons, it appears to me that the order of Humphreys J. ought not to have been discharged and that the service was good service, although the defendants, Wilson & Mackinnon, were served in their firm name. The result will be that the appeal must be allowed and the service will stand good.

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(1) [1894] 1 Q. B. 784.
(2) Ibid. 787.
(3) [1894] 1 Q. B. 788.
(4) Ibid. 791.

It is said that if the full facts had been known there would have been no order for service out of the jurisdiction. That is true, and it is true for this cogent reason, that such an application would have been wholly unnecessary, because the defendants, Wilson & Mackinnon, could quite clearly have been served at their place of business under Order XLVIII.A, r. 3. But, in the somewhat exceptional circumstances of the present case, we do not think it right to recall the order made by Humphreys J. on March 5, 1931. It may be that the rights of the parties might be altered. All those matters can be dealt with in the action if and when it comes for trial, but the appeal must be allowed and with costs.

Romer L.J. I agree. Looking at Order XLVIII.A, r. 3, it is clear that the words " within the jurisdiction " in the early part of that rule are not capable grammatically of applying to service of the writ upon any one or more of the partners. That being so, it follows that, according to the usual rules of construction, service on one or more of the partners out of the jurisdiction must have the same effect under the rule as a service on one or more of the partners within the jurisdiction. I do not myself think that any member of the Court of Appeal in *Worcester City and County Banking Co.* v. *Firbank, Pauling & Co.* (1) intended to intimate a contrary opinion. In that case it must be remembered that a writ had been issued against a firm of which both the partners resided out of the jurisdiction, but that no leave had been given for the issue of the writ or for its service out of the jurisdiction. In those circumstances the plaintiff obtained leave to serve the firm by means of substituted service on a person in this country, not by serving the manager of the business of the firm which was carried on here, but some relation of one of the partners who happened to be residing in this country. The Court of Appeal were at pains to point out that, inasmuch as service could not have been effected upon the partners out of the jurisdiction, there was no justification to make an order for substituted service in this country. The reason why neither of the partners out of the jurisdiction could have been served was that no leave had been obtained under Order XI. to serve them. That I think sufficiently explains the observations made by Lord Esher and Lopes L.J. in giving their judgments. Lord Esher said (1): " Suppose there had been no order for substituted service, it is clear that, Pauling being abroad, he could not have been served so as to make a good service on the firm." He was referring, I have no doubt, to the fact that no leave had been obtained to serve the writ out of the jurisdiction. Lopes L.J. said (2): " One mode of service authorized by the rule "—that is r. 3—" is service on one or more of the partners within the jurisdiction; another is service at the principal place of business of the partnership, within the jurisdiction." Then he said: " In this case it could not have been served on the partner personally because he was out of the jurisdiction, and no leave had been obtained to serve it." Davey L.J., I think, made it clear that that was the reason why they came to the conclusion that no service could have been made on the partner abroad—namely, that no leave had been obtained to do so. He said (3): " A person out of the jurisdiction cannot be served with a writ except under Order XI. by leave of the Court or a judge. Therefore, clearly such partner could not have been personally served." I therefore come to the conclusion that under r. 3 of Order XLVIII.A, service on a foreign firm (by which I mean a firm of which one or more of the partners are out of the jurisdiction) can be effected by serving a partner out of the jurisdiction, assuming, of course, that the firm is one that carries on business within the jurisdiction and that leave has been obtained from the Court or a judge under Order XI. to effect service in that way.

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(1) [1894] 1 Q. B. 784.

(1) [1894] 1 Q. B. 788.

(2) [1894] 1 Q. B. 790.

(3) Ibid. 791.

An examination of the history of this rule and of r. 1 of the same Order strongly confirms the opinion which I have formed. The forerunner of Order XLVIII.A, r. 1, was Order XVI., r. 14, and that was substantially in the same terms as r. 1 of Order XLVIII.A, except that it was not confined in its operation to firms carrying on business in this country. In terms it applied to every partnership firm, whether a foreign firm or not, and whether it had a place of business in this country or not. It was suggested by Bowen L.J., in a case to which I shall have occasion to refer in a moment, that that Order did not apply at all to a foreign firm—by which, as I say, I mean a firm one or more of the members of which are out of the jurisdiction—and North J., in a case, to which it is not otherwise necessary to refer, of *Indigo Co.* v. *Ogilvy* (1), said it seemed to be doubtful. In my opinion, however, there was no occasion for any such suggestion or doubt. After all, the question whether in a writ issued by a plaintiff in this country the members of a partnership firm being sued shall be described at length or shall be compendiously described by their firm name is purely a domestic matter and raises no question of international law or international comity. When, however, the predecessor of Order XLVIII.A, r. 3, came to be applied the matter was very, very different. That rule was in these terms: "Where persons are sued as partners in the name of their firm under Rule (1.), the writ shall be served either upon any one or more of the partners or at the principal place, within the jurisdiction, of the business of the partnership upon any person having at the time of service the control or management of the partnership business there; and, subject to these Rules, such service shall be deemed good service upon the firm so sued." But for that rule a foreign firm, whether sued in the individual names of the partners or sued in the partnership name, could only be served by having recourse to Order XI.; and every partner would have to be served, if he were out of the jurisdiction, by the leave of the judge. If, however, this Order—Order IX., r. 6—was to apply to a foreign firm it would be possible for a plaintiff in this country to bring an action against a foreign firm, and by serving one of the partners who happened to be here or by serving a manager at the principal place of business of the foreign firm in this country to obtain relief against persons out of the jurisdiction, without having recourse to Order xi., and free, therefore, from all the conditions, restrictions and safeguards that Order xi. imposes. That question came to be considered by the Court of Appeal in *Russell* v. *Cambefort* (1), and the Court pointed out there that it would be wrong to construe the Order as giving jurisdiction against those who were in no way subject to the British Parliament. The members of the Court were Cotton, Fry and Lopes L.JJ., and not one of them suggested that Order xvi., r. 14, did not apply to a foreign firm. What they did hold was that Order ix., r. 6, did not apply to a foreign firm. Cotton L.J. said (2) that the rule "ought to be construed only as applying to partnerships the members of which either by their nationality or residence have become subject to English law and to the power of Parliament." He said later on: "In my opinion, we ought not to construe the rule so as to bring within the jurisdiction persons who neither by nationality nor by residence are capable of being made subject to the jurisdiction." Fry L.J. said (3): "It would be remarkable if we found in another rule"—he had just been referring to Order xi.—"that service might be effected without the exercise of judicial discretion on foreign subjects resident abroad. When I read the rule I think it is clear that Order ix., r. 6, can only apply where the partners themselves can be served, but would apply to an English firm who might have their principal place of business abroad." It is interesting to observe that in the course of giving his judgment Cotton L.J. referred to an argument that has been addressed to the Court, that the firm in the case before them, being a firm that had a place of business in this country and carried on business here, ought to be considered as having submitted itself to English jurisdiction by having a residence in this country. The effect of that decision was that, though a foreign firm might be sued here in its firm name, yet service on the foreign firm could only be effected by means of Order XI., and that the provisions of Order IX., r. 6, did not apply. That was a case where service had been sought to be effected on a foreign firm carrying on business here by serving the manager of the business in this country, all the partners of the firm being abroad at the time.

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(1) [1891] 2 Ch. 31.

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(1) 23 Q. B. D. 526, 528.

(2) 23 Q. B. D. 528, 529.

(3) Ibid. 530.

That case was followed shortly afterwards in *Western National Bank of City of New York* v. *Perez, Triana & Co.* (1) The only distinction between that case and *Russell* v. *Cambefort* (2) was this, that although the firm was a foreign firm and all the members were usually resident abroad, one of the members of the firm happened to be here temporarily, and service was effected on him. It was contended that that service was a sufficient service on the foreign partner. The Court, following *Russell* v. *Cambefort* (2), said not. I will not refer to the judgments, except to say that it was in that case that Bowen L.J. suggested the doubt to which I have already referred as to whether a foreign firm came within the provisions of Order XVI., r. 14. He said (3): "The writ is no doubt irregular, in that it uses a single firm name to describe the defendant and others, who are beyond the jurisdiction."

Oddly enough, in the same volume, at a later date, there is to be found the case of *Lysaght, Ld.* v. *Clark & Co.* (4), to which my Lord has already referred. In that case there was a foreign firm, but one of the partners was resident here and service was effected upon that partner of a writ without having recourse naturally to Order XI., and it was contended that that was a good service on the foreign partner out of the jurisdiction. Cave and Grantham JJ. in the Divisional Court held that it was. It will be observed that the whole mischief which the Court of Appeal in *Russell* v. *Cambefort* (2) had avoided by the decision which they had given would

(1) [1891] 1 Q. B. 304.
(2) 23 Q. B. D. 526.
(3) [1891] 1 Q. B. 304, 317.
(4) [1891] 1 Q. B. 552.

have been brought about by the decision of the Divisional Court, because there would have been effected service on a man out of the jurisdiction without having recourse to Order XI. at all. I think the decision of the Divisional Court in that case must really be regarded rather as an intelligent anticipation of what the Rule Committee did in the year 1891, than as a correct application of the rule which had been construed already by the Court of Appeal.

In *Dobson* v. *Festi, Rasini & Co.* (1) a foreign firm had been sued in the firm name, and all the partners were out of the jurisdiction, and the service was alleged to have been properly effected by serving one partner out of the jurisdiction after obtaining leave under Order XI. The case did not perhaps fall within what I may call the mischief of the rule in *Russell* v. *Cambefort.* (2) Nevertheless, the Court of Appeal decided that, inasmuch as it had been held in *Russell* v. *Cambefort* (2) that Order IX., r. 6, did not apply to a foreign firm, they must follow *Russell* v. *Cambefort* (2), and they did so.

The effect of all these cases must have been practically to render Order IX., r. 6, a dead letter, because no plaintiff could safely rely upon that rule when suing a partner for fear that it might turn out that one of the partners of the firm, of whom perhaps he had never heard, was resident abroad, and therefore recourse would always have been had to Order XI., and recourse would never have been had to Order IX., r. 6. I think it was to meet that situation that the Rule Committee in 1891 altered the two rules. They took the view apparently that had been put before the Court of Appeal in *Russell* v. *Cambefort* (2), that if a firm carried on business here it might, not unjustly, be deemed to have submitted itself to the jurisdiction under Order IX., r. 6, if that rule were construed as extending to a foreign firm. Accordingly, it altered Order XVI., r. 14, by putting it in the form in which it now appears, r. 1 of Order XLVIII.A, and confined the power of suing a firm in the firm name to

(1) [1891] 2 Q. B. 92.

(2) 23 Q. B. D. 526.

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Romer L.J.

the case of a firm carrying on business in this country. At the same time they added words to Order IX., r. 6 (which is now r. 3 of Order XLVIII.A), which made it clear that service on the firm in either of the ways which had been permitted by Order IX., r. 6, should bind members of the firm out of the jurisdiction who had not in fact been served personally. The result of all that is, as it seems to me, that now a member of a foreign firm can, by the appropriate steps being taken under Order XI., be served out of the jurisdiction, and that such service is to be deemed good service upon all other members of the firm who are out of the jurisdiction. It was not necessary to state in terms in that rule that service might be made on a partner out of the jurisdiction; that already could have been done under the old rules. You could always, by taking appropriate steps under Order XI., serve a partner who was out of the jurisdiction. But what it was necessary to provide was that such a service should be deemed good service on all the other partners out of the jurisdiction; and this, in my opinion, is what the rule was intended to, and did in fact, bring about.

For these reasons it appears to me that the order made by Humphreys J. was right and should not have been set aside, and that this appeal, accordingly, should be allowed.

As to the question of the exercise by Humphreys J. of his discretion in the matter, I have nothing to add to what has fallen from the Master of the Rolls.

Appeal allowed.

Solicitors for appellant: *Edmond O'Connor & Co.*

Solicitors for respondents Wilson and Mackinnon: *Linklaters & Paines.*

W. I. C.

C. A.

1932

June 29, 30.

In re O'CONNOR AND BREWIN'S ARBITRATION.

Landlord and Tenant—Agricultural Holding—Tenancy Agreement—Notice to quit—Compensation for Disturbance—Claim by Tenant—Particulars of Claim—Sufficiency of Particulars—Agricultural Holdings Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 9), *s.* 12, *sub-s.* 6; *s.* 16.

The Agricultural Holdings Act, 1923, s. 16, sub-s. 1, provides that "any question or difference arising out of any claim by the tenant of a holding against the landlord for compensation payable under this Act . . . . shall be determined . . . . by a single arbitrator in accordance with the provisions set out in the Second Schedule." Sect. 16, sub-s. 2, provides that "any such claim as is mentioned in this section shall cease to be enforceable after the expiration of two months from the termination of the tenancy unless particulars thereof have been given by the . . . . tenant to the landlord . . . . before the expiration of that period." A tenancy having been determined by notice to quit expiring on September 29, 1930, the tenant gave notice of (amongst others) a claim for disturbance, and on November 20, 1930, furnished particulars in which particulars of claim for disturbance were "Disturbance two years' rent £514 0 0":—

Held (reversing the decision of the county court judge), that no sufficient particulars had been delivered and therefore that the claim was barred.

Jones v. *Evans* [1923] 1 K. B. 12 applied.

Appeal from a decision of the Chipping Norton County Court judge on a special case stated by Mr. H. P. Stace, the arbitrator appointed in these proceedings, for the opinion of the Court under the Agricultural Holdings Act, 1923.

The case was substantially as follows:—

(1.) Thomas Edward Brewin became the tenant of Mrs. C. E. F. W. O'Connor by an agreement made on May 16, 1928, at a rent of 257*l.* a year. By such agreement the Grange Farm, Swerford, was let to the said Edward Brewin (hereinafter called "the tenant") by the said Mrs. O'Connor (hereinafter called "the landlord") for nine months running from December 25, 1927, to September 29, 1928, and thereafter from year to year till twelve months' notice to quit should be given by either party.

(2.) Notice to quit was in fact given by each party expiring September 29, 1930. It was unnecessary for the purpose of the case to determine under which notice the tenancy was actually terminated. It was undisputed that it came to an end on that date.

(3.) On or before the termination of the tenancy each party indicated to the other that certain claims were to be made against the other and claims were in fact made

A, on behalf of the tenant

(1.) for compensation for disturbance;
(2.) for compensation for loss of user of a road;
(3.) for tenant right;

and B, on behalf of the landlord, for dilapidations and/or deterioration.

(4.) These claims were referred under the Act to Mr. Stace as arbitrator, but the parties with his assent agreed to relegate to a future hearing all questions of disputed fact, including questions of law mixed with questions of disputed fact. This involved the exclusion from the hearing which had taken place of the issues referred to in para. 3 under A (2.) and (3.) and under B, and the exclusion also, so far as the issue A (1.) (the claim for disturbance) was concerned, of the question whether the tenant was at the material time in breach of his obligation to repair certain fences and disentitled on that score to any compensation for disturbance. The arbitrator accordingly heard legal argument confined to certain other aspects of A (1.), and had at the request of the parties formulated the contentions which they raised in respect of that claim in this Case.

(5.) Under A (1.) the tenant had, in ostensible compliance with s. 16, sub-s. 2, of the Act, furnished particulars of the compensation for disturbance which he claimed. Such particulars were furnished on or about November 20, 1930, and in any case within two months of the termination of the tenancy. The document in which the particulars of the claim quoad disturbance were included was in the following form: "In pursuance of s. 16 (2.) of the Agricultural Holdings Act, 1923, I now beg to annex hereto particulars of my claim against you and other questions and differences between us in respect of the holding known as the Grange Farm, Swerford, recently held by me as your tenant under a tenancy which terminated on the 29th day of September, 1930, last.

Particulars.

Disturbance . .	Two years' rent .	£514 0 0"

(Then follow as part of the same document "particulars" of the loss of user of the road and of tenant right referred to above.)

(6.) The questions argued before the arbitrator and now raised for the opinion of the Court were as follows :—

(i.) Were such particulars a sufficient compliance with s. 16, sub-s. 2, of the Act of 1923 as construed by the Courts ?

(ii.) Under the provisions of the said Act, and particularly having regard to s. 12, sub-s. 6, of the said Act, was the tenant entitled, claiming as he did, as damage for disturbance, a larger sum than one year's rent, to recover at least one year's rent as damage : or was his claim in this respect limited to such damage as he could actually prove ?

It was for the purpose of the argument and of this Case admitted on behalf of the landlord that *some* damage from disturbance had been sustained by the tenant.

(7.) The contention on behalf of the tenant was that both the questions formulated in para. 6 ought to be answered in the affirmative, i.e. :—

(1.) that the particulars were sufficient.

(2.) that he was entitled to one year's rent in any event.

The landlord contended the opposite.

The question for the Court was which of these respective contentions was well founded in law.

The county court judge was of opinion that the particulars delivered by the tenant to the landlord satisfied the requirements laid down by the majority of the Lords Justices in *Jones* v. *Evans* (1): and that both questions in the special Case should be answered in the affirmative.

The landlord appealed. The appeal was heard on June 29 and 30, 1932.

Hon. Cyril Asquith for the appellant. The tenant has not supplied sufficient particulars of his claim to comply with

(1) [1923] 1 K. B. 12.

s. 16, sub-s. 2, of the Agricultural Holdings Act, 1923. That sub-section simply uses the word "particulars" but in *Jones* v. *Evans* (1) it was held that there must be true particulars giving information not only of the class of claim —in this case compensation for disturbance—but also of the nature of the claim: see also *Duke of Montrose* v. *Hart.* (2) Tested in that way the particulars given by the tenant are completely inadequate; and if the tenant failed to give proper particulars of his claim, it is absolutely barred. He is not even entitled to one year's rent under s. 12, sub-s. 6. Some loss must be proved before a right to compensation arises at all: *Minister of Agriculture and Fisheries* v. *Dean.* (3) It is true that here some damage has been admitted, but that does not do away with the right to particulars, as provided in s. 16, sub-s. 2, before any claim can be made.

Sect. 12, sub-s. 6, is not directed to the question of particulars, and there is nothing in it to dispense with the requirements of s. 16, sub-s. 2, where a claim is for less than a year, even if the tenant is in that case entitled to one year's rent: *M'Harg* v. *Speirs.* (4)

Somervell K.C. and *Alexander Wedderburn* for the tenant. The statute under construction contemplates that the parties will proceed without legal assistance, and that is the reason why it has been laid down that technical rules as to particulars are to be disregarded: see *Jones* v. *Evans.* (5)

[LORD HANWORTH M.R. Particulars must, however, be something opposed to generalities.]

In *Duke of Montrose* v. *Hart* (2) the Lord Justice-Clerk (Lord Alness) says (6): "I can find nothing in the statute to suggest that the particulars of the claim must be sufficient in their character to satisfy the arbiter when he comes to expiscate the problems of the arbitration." Here the claim is in respect of disturbance under s. 12, and sub-s. 7 gives the landlord special protection in certain cases. Thus under sub-s. 7 (*a*) compensation is not to be payable in respect of the sale of any goods,

(1) [1923] 1 K. B. 12.
(2) 1925 S. C. 160.
(3) [1924] 1 K. B. 851.
(4) 1924 S. C. 272.
(5) [1923] 1 K. B. 12, 17, 20.
(6) 1925 S. C. 165.

implements, fixtures, produce or stock unless the landlord is first given an opportunity of taking a valuation. Having regard to these special provisions the particulars of claim required under s. 16, sub-s. 2, are, it is contended, satisfied by what has been done in this Case.

In *Minister of Agriculture and Fisheries* v. *Dean* (1) the particulars given seem only to have been of the amount of one year's rent, and no point was taken as to that. Sect. 16, sub-s. 2, relates to any of the numerous claims for compensation that can be made under the Act, and the intention of the Act was to leave the particulars to be given quite vague, so that they could be given by word of mouth. The statute affords the landlord other special protection when necessary, as in s. 12, sub-s. 7.

But in any case it is contended that no particulars need be given when the claim under s. 12 is limited to one year's rent. All that is necessary is to show some loss. Here it is true the tenant claimed originally two years' rent, but that includes the lesser claim. The Court ought not to extend the decision in *Minister of Agriculture and Fisheries* v. *Dean.* (2)

[No reply was called for.]

LORD HANWORTH M.R. This is an appeal from the county court judge on a Case stated by an arbitrator appointed to determine matters that had arisen between the landlord and tenant under the Agricultural Holdings Act, 1923. Mr. Thomas Edward Brewin was the tenant of Grange Farm, Swerford, and Mrs. O'Connor is the landlord. The Case states that notice to quit was in fact given expiring on September 29, 1930. It so happens that notice to quit was given by each party, but it does not matter which was the effective notice; it is undisputed, as we are told in the Case, that the tenancy came to an end on September 29, 1930. Before the termination of the tenancy each party indicated to the other certain claims that were to be made against the other, and claims were, in fact, made (*a*) on behalf of the tenant, and (*b*) on behalf of the landlord. The claims on the

(1) [1924] 1 K. B. 851, 854.

(2) [1924] 1 K. B. 851.

part of the tenant were: (1.) for compensation for disturbance; (2.) for compensation for loss of user of a road; and (3.) for tenant right. The landlord claimed against the tenant for dilapidations and/or deterioration of the land while the holding of the tenant.

The main question that we have to determine is whether or not the particulars which were given of the claim for compensation for disturbance were sufficient. The Case states that under the first claim, the tenant had, in ostensible compliance with s. 16, sub-s. 2, of the Act, furnished particulars of the compensation for disturbance which he claimed. They were furnished within two months of the termination of the tenancy, and they took this form: "Particulars, Disturbance, two years' rent, 514*l.*" The reason why 514*l.* was inserted was that the rent was 257*l.* a year, and, multiplying 257 by 2, you get the figure of 514. The particulars are therefore simply "disturbance, two years' rent."

The first question argued before the arbitrator, and now presented for the opinion of this Court, is: "Were such particulars a sufficient compliance with s. 16, sub-s. 2, of the Act of 1923?"; and the second is: "Under the provisions of the said Act, and particularly having regard to s. 12, sub-s. 6, of the said Act, was the tenant entitled, claiming as he did, as damage for disturbance, a larger sum than one year's rent, to recover at least one year's rent as damage: or was his claim in this respect limited to such damage as he could actually prove?" Apart from the question of the form of the claim and the particulars given, it was admitted by the landlord that, in fact, some damage from disturbance had been sustained by the tenant.

The point which has been argued on behalf of the landlord by Mr. Asquith is that the tenant has not brought himself within the terms of the Act of Parliament, because he has not complied with s. 16, sub-s. 2, of the Act. The Agricultural Holdings Act, 1923, is an Act which consolidates certain earlier enactments relating to agricultural holdings in England and Wales, and there are a number of sections which provide that compensation for improvements and disturbance shall be paid under certain circumstances by the landlord to the tenant, and equally there are certain rights which are given by way of defence or counterclaim to the landlord. Sect. 16, sub-s. 1, provides that if any question or difference arises out of a claim by the tenant of a holding against the landlord, or out of any claim by the landlord against the tenant, these questions shall be settled and determined by arbitration under the Act; and the arbitration is not the arbitration provided in the Arbitration Act, 1889, but there is a table of the rules which are to apply to the arbitration set out in Sch. II. of the Act.

The main question arises upon s. 16, sub-s. 2, of the Act; but, first, we must see what matters are embraced in sub-s. 1 of that section. Provision is made for determination by arbitration of: "Any question or difference arising out of any claim by the tenant of a holding against the landlord for compensation payable under this Act, or for any sums claimed to be due to the tenant from the landlord for any breach of contract or otherwise in respect of the holding, or out of any claim by the landlord against the tenant for waste wrongly committed or permitted by the tenant, or for any breach of contract or otherwise in respect of the holding." It is plain, then, that several different kinds of claims are referred to in sub-s. 1 of s. 16. Sub-s. 2 relates to all these, for it opens with the words: "Any such claim as is mentioned in this section"; and it is in respect of any of those claims that the sub-section provides that they "shall cease to be enforceable after the expiration of two months from the termination of the tenancy unless particulars thereof have been given by the landlord to the tenant or by the tenant to the landlord, as the case may be, before the expiration of that period." It is plain, therefore, that either party must give to the other something amounting to "particulars" of the claim. What, then, is meant by "particulars"? I think it is right to say that there cannot be, in respect of all cases, a precise and accurate definition of what those particulars ought to be. But the nature of particulars is that they operate to limit inquiries to the matters set out in the particulars. I agree, as laid down in *Jones* v. *Evans* (1), that the requirement of "particulars" involves something of a rather loose description. Mr. Wedderburn has pointed out that in some sections there is a requirement of writing. This notice in writing has to be given under s. 9, and s. 10 (*a*) provides that compensation for deterioration of a holding shall not be payable unless the landlord has, before the termination of the tenancy, given notice in writing to the tenant of his intention to claim compensation; and so, too, in respect of damage by game under s. 11, sub-s. 2, unless notice in writing of the damage is given forthwith to the landlord. It is plain, therefore, from ss. 9, 10 and 11, that where writing is required the Act has expressed it; and, applying the ordinary rule of construction to the Act of Parliament, I think that, as s. 16, sub-s. 2, does not provide for particulars in writing, the particulars may be given verbally, and that for a good reason. It may be that the parties are negotiating on friendly terms without the assistance of lawyers or others, and it may be quite possible for the tenant and the landlord to convey to each other their respective intentions with regard to claims for compensation by verbal notice of the particulars of claim. That was made plain in *Jones* v. *Evans* (1), a case decided in this Court, which is binding upon us. I agree with it, and intend to follow it. There Bankes L.J. points out (2) that particulars may be verbal, but they remain particulars, provided they contain general information as to the nature of the particular claim as distinguished from the class of claim. I bear in mind then that the particulars in this case could have been given verbally, but, as I have pointed out to Mr. Wedderburn (who agreed with me), there is nothing in the section to exclude the use of writing, if the particulars to be given are such as are not easily given verbally. However, the fact remains that these particulars need not be in writing, and that they may be of a loose nature; but they must still fulfil Bankes L.J.'s test and contain information as to the nature of the claim as distinguished from the class of claim. Warrington L.J. says that the particulars are sufficient if they give "an indication to the landlord or the tenant, as the case may be, of the particular kind of claim which is going to be made in order that he may have an opportunity of himself examining the subject matter and seeing what evidence he will have to adduce, or what information he will have to give the arbitrator." That is, to my mind, a lucid and sufficiently precise expression of what is meant by "particulars" in this Act. The word connotes something that is particular, and not merely a generality.

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(1) [1923] 1 K. B. 12.

(2) [1923] 1 K. B. 17.

We have to remember one other thing. Under s. 12 a right to compensation for disturbance is given to a tenant, but it is not a right to compensation for disturbance in all cases merely by reason of the fact that he has ceased to be the tenant of the holding. There are certain conditions which would deprive the tenant of his right to that claim set out in the sub-paragraphs of s. 12, sub-s. 1. Thus, under the first of these conditions, the tenant is entitled to his compensation for disturbance unless he was not at the date of the notice cultivating the holding according to the rules of good husbandry. So, too, under sub-s. 7, compensation is not to be payable in certain other circumstances set out there. It is not, then, a case in which in all circumstances, on the mere determination of the relation of landlord and tenant, compensation for disturbance becomes payable. That is emphasized by the decision given in *Minister of Agriculture and Fisheries* v. *Dean* (1), where the Court of Appeal lays down that a tenant must give some evidence of a loss of the kind indicated in the sub-section before he can be entitled to compensation for disturbance, and that in the absence of evidence of loss compensation is not to be given to him. "The other construction," says Bankes L.J. (2), "is that as soon as the tenant establishes that he has suffered some loss or expense directly attributable to the quitting of the holding, he is entitled to his year's rent, and is absolved from the obligation of proving the actual amount of the loss

(1) [1924] 1 K. B. 851.
(2) [1924] 1 K. B. 856.

and expense." That is the interpretation and construction which he holds is the most reasonable. But it connotes this, that the tenant must have suffered some loss directly attributable to the quitting of the holding, and that he must prove that he has suffered such a loss. The words, I think, of sub-s. 6 of s. 12 lead to that position: "The compensation payable under this section shall be a sum representing such loss or expense directly attributable to the quitting of the holding as the tenant may unavoidably incur upon or in connection with the sale or removal of his household goods, implements of husbandry, fixtures, farm produce or farm stock on or used in connection with the holding, and shall include any expenses reasonably incurred by him in the preparation of his claim for compensation." The adverbs that are used in that sentence show that there is a responsibility lying on the tenant to establish his right to compensation for loss or expense "directly attributable" to the disturbance which he may "unavoidably incur," and expenses "reasonably incurred" in preparing the claim to compensation. It will be observed that, following *Dean's* case (1), he must give some evidence of loss in respect of one or other of the various items catalogued in sub-s. 6.

When I turn back to s. 16, sub-s. 2, I ask myself whether or not, in giving the particulars, which in the present case were "Disturbance, two years' rent," he has fulfilled the standard laid down by Warrington L.J., and whether by saying, "Disturbance, two years' rent," he has given to the landlord an indication of the particular kind of claim which he is going to make, in order that the landlord may have an opportunity of examining such matters and seeing what evidence he will have to adduce or what information he will have to give to the arbitrator. It seems to me plain that the words that are used are general, as opposed to or in contradiction to particulars, and while I do not at all intend to lay down any precise rule as to what particulars must be given, it will be well to bear in mind those words of Warrington L.J., and to remember the test, which I have

(1) [1924] 1 K. B. 851.

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suggested earlier, that the particulars must limit the inquiry by showing what is the issue between the parties.

Has then the tenant in this case fulfilled the conditions which must be fulfilled if he is to succeed in his claim? Has he given particulars of his claim for disturbance to the landlord within two months from the termination of the tenancy? I can only answer: No, he has not. The Legislature have put a time limit, and a time limit which is not unreasonable, for the tenant's right to compensation arises by reason of a notice to quit given by the landlord; the notice to quit would be a twelve months' notice, and the tenant has that time with an additional two months, or fourteen months in all, in which to come to a conclusion as to the nature of his claim and the particular matter on which he is going to rely to establish that he has suffered a loss directly attributable to the quitting of the holding and unavoidably incurred. He can very well make up his mind about that in that time, and there must be some finality in these cases.

The result is that the claim in the present case has not been sufficiently particularized within the terms laid down by *Jones* v. *Evans* (1), with the consequence that it can no longer be brought.

I only want to add a few words on the question whether a tenant is entitled to one year's rent in any event. I desire to say that we agree with the decision of the Court of Session in *M'Harg* v. *Speirs.* (2) There a tenant claimed compensation for disturbance to an amount exceeding one year's rent. The claim went to arbitration, in which it was proved that the damage sustained by him was less than one year's rent. It was held that the minimum compensation payable to the tenant was one year's rent, and that, although there had been a dispute as to the loss, the tenant was entitled to the one year's rent, and not merely to the amount of the actual damage incurred. The position, in other words, is that where the tenant has discharged the onus which lies upon him to prove that he has directly suffered loss, then, though the

(1) [1923] 1 K. B. 12.

(2) 1924 S. C. 272.

loss proved does not amount to one year's rent, the section entitles him to a sum equal to one year's rent. This point really lies outside the question that we have to determine; but it has been mentioned and therefore I have referred to it.

On the main question I hold that the particulars which were given were wholly insufficient to comply with the condition laid down by the Act in sub-s. 2 of s. 16; and the tenant's claim therefore fails. The appeal must be allowed, and our decision must be that the particulars are insufficient, with the result that the claim for disturbance must be refused, with costs.

SLESSER L.J. I am of the same opinion. The learned county court judge, in deciding in the affirmative the question asked in the Special Case, and, in particular, that the particulars were sufficient, said: "I was of opinion that the particulars delivered by the tenant to the landlord satisfied the requirements laid down by the majority of the Lords Justices in *Jones* v. *Evans*." (1) In my view, the learned county court judge has not fully appreciated what was decided in *Jones* v. *Evans* (1), which is a decision of this Court and binding upon us. In *Jones* v. *Evans* (1) there was a number of claims for compensation under various heads; those heads were set out with some particularity—for example, failure to keep the dwelling-house and premises generally in substantial repair, failure to keep the hedges or fences in substantial repair, and so on, many of them alleging in substance that there had been a failure to repair. On that it was said that it was necessary to give particulars substantially in the same degree of detail as would be required in a Court of law in a judicial proceeding. That view did not find favour with the majority of the Court. It was pointed out, both by Bankes L.J. and by Warrington L.J., that the statute contemplated a claim being made orally as well as in writing, and that there being a time limit on such claim, regard should be had to the severity of the penalty attached to non-compliance. That case was discussed both by

(1) [1923] 1 K. B. 12.

Bankes L.J. and by Warrington L.J. on that basis. But their Lordships were both at pains to point out that although the particularity required was not of so high a degree as might be required in proceedings of a more strictly judicial character, yet that particulars of some kind were required in addition to the bare claim. Bankes L.J. points out (1) that it is necessary to specify both the class of the claim and the nature of the claim, and he explains the distinction between the two by reference to the particular case. He says: "The class of claim . . . . is damages for breach of the covenant to repair." That, in my opinion, would correspond with the claim here by the tenant for "disturbance, two years' rent," which, I think, on the finding of Bankes L.J., may fairly be called a class of claim. Then he goes on to point out that it is necessary to state the nature of the claim, and he instances the first item in the document to which I have referred already: "For neglect or failure to keep the dwelling-house . . . . and the premises generally in substantial repair." In my view the particulars in the present case entirely fail to state the nature of the claim, as distinct from the class of the claim, and, therefore, I cannot see how it would have been possible for the landlord, merely having been given a class of claim and not the nature of the claim, to have had those rights which Warrington L.J., in *Jones* v. *Evans* (2), points out that he is entitled to. The Lord Justice says (3): "It is in general sufficient if the document or the conversation which contains the particulars gives an indication to the landlord or the tenant, as the case may be, of the particular kind of claim which is going to be made in order that he may have an opportunity of himself examining the subject-matter and seeing what evidence he will have to adduce, or what information he will have to give the arbitrator." In the present case the only information the landlord was given was "disturbance," and looking at s. 12, sub-s. 6, of the Agricultural Holdings Act, 1923, we see that under the heading of disturbance compensation may arise

(1) [1923] 1 K. B. 18.
(2) [1923] 1 K. B. 12.
(3) Ibid. 20.

on several grounds, although in any event it must be directly attributable to the quitting of the holding. It might be a claim in connection with the sale or removal of his household goods, implements of husbandry, fixtures, farm produce or farm stock, and it might include expenses reasonably incurred by him in the preparation of his claim for compensation. In my opinion, it is impossible for the landlord, merely receiving the information that the class of claim is a claim for disturbance, to know what evidence he will have to adduce or to know what subject-matter he will have to deal with, or what information he will have to give to the arbitrator. In point of fact there are in s. 12 certain substantial reliefs or protections given to the landlord, which apply only to certain claims within that section and not to others; for example, if the nature of the claim be a claim in respect of the sale of goods or implements of husbandry or farm produce or stock, compensation is not to be payable, unless the tenant has, before the sale, given the landlord a reasonable opportunity of making a valuation of them. Looking then at the section itself, apart from any other consideration, I think it clear that the landlord has not been given the particulars to which he was entitled. Indeed I find great difficulty in seeing that he has really been given any particulars at all. It is required under the Act that the landlord shall receive notice of a claim, and that notice of a claim is to be made before the tenant had ended the tenancy. What is called "particulars" in this case appears to be no more than a notice of a claim given after the tenancy has come to an end. *Jones* v. *Evans* (1) decided, as I understand it, that particulars need not be of a very exhaustive or exact nature, but *Jones* v. *Evans* (1) does nothing to do away with the requirement for particulars of the nature of the claim. Those particulars have not been given in the present case, and that seems to me to be a fatal objection to the claim.

I will only add that, to my mind, it makes no difference whether a claim be for one year's rent or more. Sect. 12,

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(1) [1923] 1 K. B. 12.

Slesser L.J.

sub-s. 6, quantifies the amount of the claim, when it is for not more than a year, at one year's rent of the holding; but in *Minister of Agriculture and Fisheries* v. *Dean* (1), recently followed by the Court of Appeal in an unreported case, it was held that the tenant had to prove that he had suffered loss or expense directly attributable to the quitting of the holding. When once it is held that evidence has to be given by the tenant, it becomes clear that the landlord has a right to know the nature of the claim made, in order that he may consider whether he will agree to the claim or compromise the claim or fight the claim.

I agree that this appeal must be allowed.

Romer L.J. I agree. I share the desire expressed by Warrington L.J. in *Jones* v. *Evans* (2) not to lay down any strict or narrow rule as to the particulars required by s. 16, sub-s. 2, of the Agricultural Holdings Act, 1923. I myself should be always willing to treat a statement as complying with the provision of the sub-section, so long as it was possible, without undue exaggeration, to dignify the statement with the name of "particulars," and so long as the statement was reasonably giving effect to the intention of the Legislature. That intention was, to use the language of Warrington L.J. in *Jones* v. *Evans* (2), to give an opportunity to the person against whom the claim was made of himself examining the subject-matter, and seeing what evidence he would have to adduce or what information he would have to give to the arbitrator. The statement by a tenant that he claims compensation for disturbance, whether he quantifies his claim by reference to one year's rent or to two years' rent, does not in my opinion comply with the sub-section. It is a very general statement of the class of claim that is being made; it cannot be dignified by the name of "particulars." It does not give the landlord that opportunity to which Warrington L.J. referred. If we were to hold that such a statement is a compliance with the

(1) [1924] 1 K. B. 851.

(2) [1923] 1 K. B. 12.

sub-section, it would, it seems to me, deprive the landlord of the protection that the sub-section intended to give him.

For these reasons, I agree that this appeal must be allowed.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co., for A. H. Franklin & Sons, Oxford; Ellis & Fairbairn, for Andrew Walsh, Bartram & Walsh, Oxford.*

H. C. G.

OLIVER *v.* BIRMINGHAM AND MIDLAND MOTOR OMNIBUS COMPANY, LIMITED.

1932
June 9. 10.

Negligence—Contributory Negligence—Injury to Infant—Infant in Charge of Adult—Contributory Negligence of Adult—Right of Infant to recover against Defendants.

The plaintiff, an infant, was crossing a road in the care of his grandfather. When they had reached the middle of the road, the grandfather was startled by the approach of the defendant company's omnibus and released the infant plaintiff's hand. The infant plaintiff was struck by the omnibus and was injured. In an action brought by the infant, suing by his father as next friend, the jury found that the company's servant was negligent, and that the infant plaintiff's grandfather was guilty of contributory negligence:—

Held, that the infant plaintiff was entitled to recover against the company, notwithstanding the negligence of his grandfather.

Mills v. *Armstrong. The Bernina* (1888) 13 App. Cas. 1 followed and applied.

Waite v. *North Eastern Ry. Co.* (1858) E. B. & E. 719, 728 not followed.

APPEAL from Birmingham County Court.

On July 5, 1931, at about 10.30 P.M., the plaintiff, an infant aged four years, was crossing a road in Birmingham with his grandfather, who was holding his hand. They had reached the middle of the road, when the plaintiff's grandfather was startled by the approach of the defendants' omnibus, and he released the infant plaintiff's hand. The grandfather jumped aside to a place of safety, but the infant was struck by the defendants' omnibus, and as a result of his injuries he lost four fingers of his left hand.

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The plaintiff, suing by his father as next friend, brought an action in the county court against the defendants, the motor omnibus company, for damages for personal injuries caused by the negligent driving of the defendants' motor omnibus. At the hearing of the action the jury found that the defendants' driver was negligent in not giving proper warning of his approach. They also found that the grandfather was guilty of contributory negligence. The county court judge directed the jury that the infant plaintiff was not disentitled to recover from the defendants by reason of the contributory negligence of his grandfather. The jury assessed the damages at 200*l*., and judgment was accordingly entered for the infant plaintiff for that amount.

The defendants appealed.

T. N. Winning and *Eric Falk* for the defendants. The infant plaintiff was so identified with his grandfather, in whose charge he was, as to be disentitled to recover from the defendants, because, although the jury found that the defendants' driver was negligent, they also found that the infant plaintiff's grandfather was guilty of contributory negligence. The question to be considered in this appeal is, whether the doctrine of identification, which was first laid down in *Thorogood* v. *Bryan* (1), and again in *Waite* v. *North Eastern Ry. Co.* (2), applies to the facts of this case. In *Waite* v. *North Eastern Ry. Co.* (2), a child, who was in the care of its grandmother, was injured by a passing train on a level crossing. The negligence of the grandmother contributed to the injury, and it was held that her negligence precluded the child from recovering against the defendants. *Thorogood* v. *Bryan* (1) was overruled in *Mills* v. *Armstrong. The Bernina* (3), but *Waite* v. *North Eastern Ry. Co.* (2) was distinguished on the ground that an infant's position had no analogy to that of an adult. *Waite* v. *North Eastern Ry. Co.* (2) governs the present case. It is true that that case was decided on the ground of contract, but the

(1) (1849) 8 C. B. 115.

(2) E. B. & E. 719, 728.

(3) 13 App. Cas. 1.

judgments show that apart from contract the decision would have been the same.

[Macnaghten J. An injury on the highway is not to be confused with an injury on private property, as on railway premises, where the railway company are able to limit their liability by conditions and notices.]

There is no reported case in which an infant of tender years has recovered damages where the jury have found that the parent or guardian, in whose care the infant was at the time of the accident, was guilty of negligence contributing to the accident. The judgment of the county court judge in favour of the infant should be set aside.

Hedley K.C. and *David White* for the plaintiffs. When *Waite* v. *North Eastern Ry. Co.* (1) was decided in 1859, *Thorogood* v. *Bryan* (2), which was decided in 1849, was still good law. Now that the latter case has been overruled in *Mills* v. *Armstrong. The Bernina* (3), it is difficult to argue that *Waite* v. *North Eastern Ry. Co.* (1) is not also overruled. The same reasoning with regard to the doctrine of identification applies in the case of an infant as in the case of an adult. Indeed, an infant in the care of an adult is an a fortiori case, for an infant has no volition, such as an adult passenger has, in choosing an omnibus. *Thorogood* v. *Bryan* (2) was followed in *Armstrong* v. *Lancashire and Yorkshire Ry. Co.* (4), where the doctrine of identification was applied to a railway passenger. Having regard to the change of view which has taken place since *Waite* v. *North Eastern Ry. Co.* (1) was decided, and to the judgments of the House of Lords in *Mills* v. *Armstrong. The Bernina* (3), the doctrine of identification as laid down in *Waite* v. *North Eastern Ry. Co.* (1) is no longer part of the law of this country.

Swift J. [after stating the facts and referring to the findings of the jury :] The only points raised by the notice of appeal are that the learned judge misdirected the jury by directing them that the contributory negligence of the

(1) E. B. & E. 719, 728.
(2) 8 C. B. 115.
(3) 13 App. Cas. 1.
(4) (1875) L. R. 10 Ex. 47.

infant plaintiff's grandfather was no bar to the infant plaintiff's claim, and further that, on the finding of the jury that the infant's grandfather was guilty of contributory negligence, the learned judge was wrong in law in giving judgment for the plaintiff. Mr. Winning for the defendants says that the real point in this appeal is whether the doctrine of identification, which was laid down in *Waite* v. *North Eastern Ry. Co.* (1), is applicable to the facts of this case, and he submitted to the learned county court judge at the trial, both before the verdict and after the verdict, that on the authority of that case the infant plaintiff was so identified with his grandfather, who was in charge of him, that he was disentitled to recover damages from a person whose negligence had contributed to the accident if, in addition to that negligence, there was negligence on the part of the grandfather also contributing to the accident. The county court judge referred to *Mills* v. *Armstrong. The Bernina* (2), and expressed the view that since that decision the case of *Waite* v. *North Eastern Ry. Co.* (1), could no longer be considered as good law, and that the doctrine of identification, for which Mr. Winning was contending, was no longer part of the law of England.

In my view the county court judge was right in the opinion which he expressed on that matter. Whether *Waite* v. *North Eastern Ry. Co.* (1) is to be regarded as authority for saying that the plaintiff in that case was unable to recover, because of the terms of the contract between the plaintiff's grandmother and the railway company, or because the plaintiff was an infant in arms or a small child who could not take care of herself, seems to me to matter little now for practical purposes, because I think that since the decision in *Mills* v. *Armstrong. The Bernina* (2), the case of *Waite* v. *North Eastern Ry. Co.* (1) ought to be regarded as overruled. I agree that it was not expressly overruled, but Lord Bramwell in *Mills* v. *Armstrong. The Bernina* (3) said: "I will only say that if the proposed judgment is right"—that is, if the judgment which it was proposed should be given in *Mills* v. *Armstrong. The Bernina* (1) was right—" for the reasons I gave, *Waite* v. *North Eastern Ry. Co.* (2) was wrongly decided. The abstract question must be decided on principle. I do not pretend to have a confident opinion on it, but I think the judgment [is] right, and should be affirmed. I think so on the ground that in such cases the defendant is a wrongdoer without whose wrongdoing the plaintiff would not have been damaged; that he cannot be heard to say that there is some other wrongdoer who contributed to the damage; that as far as the sufferer is concerned it matters not whether that other wrongdoer was so in a joint or separate act."

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(1) E. B. & E. 719.

(2) 13 App. Cas. 1.

(3) 13 App. Cas. 1, 16 *note*.

In *Thorogood* v. *Bryan* (3) it was held that a passenger in an omnibus, who had been injured, partly by the negligence of the driver of his own omnibus, and partly by the negligence of the driver of the defendant's omnibus, was not entitled to recover from the defendant because the driver of the omnibus in which he himself had been travelling had been guilty of contributory negligence, and it was said in that case that the plaintiff was identified with the driver of the omnibus in which he had been travelling, so as to make that driver his servant or agent. *Thorogood* v. *Bryan* (3) was expressly overruled in *Mills* v. *Armstrong. The Bernina.* (4) The question, therefore, is whether, *Thorogood* v. *Bryan* (3) having been overruled, *Waite* v. *North Eastern Ry. Co.* (5) is still law so as to have this effect, that, while no other person is deprived of his rights against a third party because of the negligence of somebody to whom he has committed the care of himself, an infant of such tender years that it cannot look after itself is deprived of those rights, and that for an infant of tender years the doctrine of identification still continues. In my view there is no ground for drawing any such distinction. An infant, a day old, has rights. Nobody has any right to injure him by negligence, and I cannot see any difference between an infant a day old and a man aged fifty. If a man who is fifty years of age is entitled to recover against

(1) 13 App. Cas. 1, 16 *note*.
(2) E. B. & E. 719.
(3) 8 C. B. 115.
(4) 13 App. Cas. 1.
(5) E. B. & E. 719, 728.

a wrongdoer, notwithstanding the fact that some one else has contributed to his injury, why should not an infant who has been maimed for life, as the infant in this case has been, recover against the defendants ?

In my view the county court judge was right in thinking that the old doctrine laid down in *Thorogood* v. *Bryan* (1) and in *Waite* v. *North Eastern Ry. Co.* (2) is no longer the law of this country, and he was right in entering judgment for the amount which the jury found in the infant plaintiff's favour. In my opinion this appeal must be dismissed.

MACNAGHTEN J. I am of the same opinion. The appellants, in their notice of appeal, ask that judgment should be entered for them on the ground that on the findings of the jury, such a judgment is the only judgment which ought to be entered according to law. No question arises in this case with regard to the trial. The appellants accept the findings of the jury without question, and merely contend that on those findings the defendants are entitled to judgment. The case therefore comes before this Court on a simple question of law, as it might have come in former times by way of demurrer to a declaration.

The question is this: Would a plea, in an action brought by an infant to recover damages for negligence, that the infant plaintiff was of such tender years as to be incapable of taking care of itself and was in fact at the time of the accident in the charge of an adult person, and that the accident was due to the combined negligence of the defendants and that adult person, be a good answer in law to the claim ? The jury have found that the defendants were guilty of negligence and that the grandfather, who, at the time of the accident, was in charge of the infant plaintiff, was guilty of contributory negligence. That means that both the defendants and the grandfather failed in the duty of care which each of them owed to this infant. If only one of them had been negligent the accident would not have occurred. It was because both were negligent that the accident occurred whereby the child was injured, and, that being so, the plea

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(1) 8 C. B. 115.

(2) E. B. & E. 719, 728.

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that the infant cannot recover because he is an infant and was under the charge of a person who, at the time of the accident, also failed in his duty towards him, is said to be good, on the authority of *Waite* v. *North Eastern Ry. Co.* (1) I think it is fair to say that the judgment of Lord Campbell in that case seems to support the view that at that time the Court would have held that an infant a few days old, in its mother's arms, was so closely identified with its mother that it could not maintain an action for injuries received by reason of the combined negligence of its mother and a third person. But I agree with Swift J. that that view of the law has been superseded in consequence of the decision in *Mills* v. *Armstrong. The Bernina.* (2) After all, children of tender years are not the only persons who are incapable of taking care of themselves. There comes a time in life when a second childhood supervenes, and the aged may be quite as incapable of taking care of themselves in a public highway as the very young, and even between the extremes of youth and age there are the halt, the maimed, and the blind. All those persons, by reason of their infirmity, have to go out into the public highway under the care of somebody else. Is such a person to be debarred from recovering compensation if he has been injured by an accident brought about by the combined negligence of the person in whose care he was and a third person? If the accident was due solely to the negligence of the person in whose care he was, there seems to be no doubt that he could recover compensation from that person. If the accident was due solely to the negligence of the third person there is no doubt that he could recover compensation from the third person. It would indeed seem very odd that if the accident was due to the combined negligence of both, he should be without remedy.

I therefore think that the judgment of the county court judge in this case was right and ought to be affirmed.

Appeal dismissed.

Solicitors for the defendants: *Hatchett Jones & Co., for W. Waldron & Son, Brierley Hill, Staffs.*

Solicitors for plaintiffs: *Berry Tompkins & Co.*

T. W. M.

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(1) E. B. & E. 719, 728.

(2) 13 App. Cas. 1.

1932
Oct. 13, 14.

WINDRIDGE *v.* ANCIENT ORDER OF FORESTERS FRIENDLY SOCIETY AND OTHERS.

Friendly Society—Annual Return—Making false Return—Offence—Completion of Offence—Summary Jurisdiction Act, 1848 (11 *&* 12 *Vict. c.* 43), *s.* 11—*Friendly Societies Act,* 1896 (59 *&* 60 *Vict. c.* 25), *ss.* 27, *sub-ss.* 1, 4; 84 (*c*).

The offence of making a false return to the Registrar of Friendly Societies under s. 84 (*c*) of the Friendly Societies Act, 1896, is not complete when the document itself is made out, but only when the return is sent to the Registrar.

CASE stated by Surrey justices.

At a court of summary jurisdiction sitting at Dorking an information was preferred on January 20, 1932, by the appellant, Bertram William Windridge, on behalf of the Chief Registrar of Friendly Societies, under the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), against the respondents, the Court Good Intent No. 2349 of the Ancient Order of Foresters Friendly Society (called herein "the said branch"), and William Scrivens (a trustee of the said branch), William Griffin Tucker, and Leonard Dinnage (auditors of the return hereinafter mentioned), for that the said Court, being a registered branch of a registered friendly society, on July 30, 1931, did, contrary to s. 84 (*c*) of the said statute, unlawfully make a return under s. 27 thereof, which said return was false, in that it purported to show that as at December 31, 1930, to which date the return was made out, the investments of the said branch included Treasury bonds of the value of 300*l*., and that the said William Scrivens and the other respondents did unlawfully aid, abet, counsel and procure the commission of the said offence contrary to s. 5 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43). The said branch was also a sub-branch of a registered branch known as the Dorking, Epsom and West Surrey District Branch of the said Order ("the district branch"). The information was heard on February 17, 1932, and was dismissed. On the application of the appellant the justices stated this case.

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The following facts were admitted or proved. The respondent Scrivens was the trustee and the other two respondents were appointed auditors of the accounts and annual return of the said branch. On February 24, 1931, the respondent auditors attended on the secretary of the said branch and inspected their books of account, but did not examine any of the items in detail nor inspect all the vouchers, nor all the deeds and securities at the bank. The security for the said Treasury bonds held by the said branch in the names of its trustees had not been in the custody of the bank nor of the trustees since June, 1928, but had been in the custody of the said secretary, who was at the time of these proceedings serving a term of imprisonment. At a meeting of the said branch on March 3, 1931, the said annual return was presented for the signatures of the respondent trustee and auditors, and they signed it without taking steps to verify that the items included in the assets of the balance-sheet of the said form corresponded with the securities which had been inspected by them at the bank and checked with the list supplied by the secretary. No fraud on the part of the respondents was suggested, but they had relied on the confidence they had in the secretary and on one another, and bona fide believed that the said form correctly showed the receipts and expenditure, funds and effects of the said branch. The said return was in fact false. It was made out for the year ending December 31, 1930. Among the assets in the balance-sheet on the said form was "Treasury bonds 300*l.*," but at that date the figures should have been 5*l.* 10*s.* only.

On March 3, 1931, aforesaid, more than six months before the information herein was laid, the said form so filled in and signed on that day was sent to the secretary of the district branch in accordance with the registered rules of the respondent branch in order that it might be sent by that secretary to the secretary of the Order. On July 30, 1931, less than six months before the said information was laid, the said form was sent to the Registrar of Friendly Societies in accordance with s. 27, sub-s. 1, of the Act of 1896.

On behalf of the appellant it was contended (inter alia) that the said offence was committed on July 30, 1931, when the return was sent to the Registrar.

For the respondents it was contended (inter alia) that the offence, if any, was committed not later than March 3, 1931, and that, accordingly, the information was out of time by virtue of s. 11 of the Summary Jurisdiction Act, 1848, in that it was laid more than six months from the time when the matter thereof arose.

The justices, being of opinion that all the respondents had committed the said offence, but that the date thereof was not later than March 3, 1931, held that the information was out of time, and accordingly dismissed the information.

Wilfrid Lewis for the appellant. The justices were wrong. A return to a person is made when that person receives it; it is made up when completed and, e.g., left on the table. Sect. 84 (*c*) of the Act of 1896 deals not only with the offence of making a false return, but also with that of furnishing false information, and one could not commit the latter offence until the communication was actually made; it would not be sufficient to write out the false information if it was then thrown into the fire.

[AVORY J. Is not this a continuing offence? Were not the personal respondents committing the offence when they sent the return to the district branch?]

No, because the offence is the sending to the Registrar, and it would, therefore, at that stage be incomplete. There would still be a locus poenitentiae.

The respondent Scrivens in person. Under the regulations of the Society the only duty of the personal respondents was to send the return to the district branch. Therefore their offence (if any) was committed when that was done—namely, on March 3, 1931, and the information consequently was out of time.

The respondent Society was not represented.

Wilfrid Lewis in reply. No doubt under the regulations it was the duty of the personal respondents to make the return to the district branch, but they were the persons appointed to make and audit the return, and the statute says that the return is to be sent to the Registrar.

LORD HEWART C.J. This is a case stated, and it arises out of an information preferred on January 20, 1932, on behalf of the Chief Registrar of Friendly Societies against a branch of the Ancient Order of Foresters Friendly Society and three other respondents, charging that the Society did unlawfully make a return under s. 27 of the Friendly Societies Act, 1896, which was in fact false, and that the other respondents aided and abetted them. The justices, having heard the information, dismissed it, and the question for this Court is whether they came to a correct decision in point of law. They have stated that the ground of their decision was that the offence was committed on March 3, 1931—namely, the date when the form of return was sent by the respondents to the secretary of the district branch to be sent on by him to the secretary of the Order, and that consequently the information was out of time under the provisions of s. 11 of the Summary Jurisdiction Act, 1848, which enacts that the information must be laid within six calendar months from the time when the matter of such information arose.

Sect. 27, sub-s. 1, of the Friendly Societies Act, 1896, provides: " Every registered society and branch shall once in every year, not later than May the thirty-first, send to the registrar a return (in this Act called the annual return) of the receipts and expenditure, funds, and effects of the society or branch as audited," and by sub-s. 4 it is provided: " In the case of a branch the annual return shall be sent to the registrar through an officer appointed in that behalf by the society of which the branch forms part."

It should be made clear that so far as these respondents are concerned there is no charge of fraud. The charge is one of making a false return, and the only question is, what is the crucial date? Apparently the justices took the view

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that it was the date when the signatures on the return were affixed in accordance with the internal rules of the Society. That seems to me erroneous. It may well be that at that time there was some offence committed and that it was a continuing offence. But the particular offence was only complete when the return was sent to the Registrar. It seems to me that there has been some confusion here between the preparation of this return and the sending it in, and I think the offence was only committed when the latter event took place. The appeal will be allowed, and the case sent back to the justices with a direction that the offence has been proved.

AVORY J. I agree, and I only wish to add that nothing in these judgments conflicts in any way with the view that an offence may be committed when the return is sent to a district branch or to the secretary of the Order in accordance with the laws of the Order.

DU PARCQ J. I agree, and do not wish to add anything.

Appeal allowed.

Solicitor for appellant: *Treasury Solicitor.*

W. L. L. B.

REKSTIN *v.* SEVERO SIBIRSKO GOSUDARSTVENNOE AKCIONERNOE OBSCHESTVO KOMSEVERPUTJ AND THE BANK FOR RUSSIAN TRADE, LIMITED.

K. B. D.
1932
April 22, 25.
C. A.
June 23, 24.

[1931. R. 475.]

Banker and Customer—Garnishee Proceedings—Unrevoked Order by Customer to Transfer Current Account—No Acceptance by or Debt owing to Transferee—Service of Garnishee Order nisi on Bank.

Judgment debtors instructed their bank to transfer their current account to another body, to whom they owed nothing, and to close their account. The transaction was duly entered in the bank's books, but before notice had been given to the proposed transferees or the transfer accepted by them, a garnishee order nisi was served by the judgment creditor on the bank:—

Held, that at the time of service the relation of banker and customer still existed between the bank and the judgment debtors, and that a debt from the bank to the judgment debtors was due upon which the order nisi could operate.

The instruction given by the judgment debtor to the bank was still revocable at the time when the garnishee order nisi was served, and that order operated in law as a revocation.

So *held* by the Court of Appeal, affirming the decision of the Divisional Court.

Rogers v. *Whiteley* [1892] A. C. 118 applied.

Dicta of Bankes and Warrington L.JJ. in *Joachimson* v. *Swiss Bank Corporation* [1921] 3 K. B. 110, 121, 126 applied.

Roberts v. *Jones* (1892) 61 L. J. (Q. B.) 523 not followed.

JUDGMENT creditor's appeal from a Master in Chambers.

At some time prior to September 2, 1931, John Ernst Rekstin, the judgment creditor, obtained a judgment for 2500*l.* against the respondents, Severo Sibirsko, etc. (called herein "the bureau") (1). At that time the bureau had a balance at the respondent bank, the Bank for Russian Trade, Ld. (called herein "the bank") of over 9000*l.* At about 1.45 P.M. on September 2 aforesaid, a letter was received by the bank from the bureau in the following terms: "We hereby request you to transfer the amount which you hold in our current account to the current account of the trade delegation of the U. S. S. R. in Great Britain, and to close our current account." The trade delegation of the U. S. S. R.

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(1) [This body, in form, as its name shows, a joint-stock company, is believed to be in effect an official department.]

(Union of Soviet Socialist Republics), called herein "the delegation," was a body having diplomatic immunity from legal proceedings. The above authority was never revoked by the bureau, nor was any communication of the proposed transfer made to the delegation, and no debt was owing from the bureau to the delegation. A clerk of the bank, on the receipt of the above letter, made the necessary inquiries and interest calculation and usual book entries and debit slip, which showed a transfer of 9194*l.* 16*s.* 5*d.* to the current account of the delegation. The clerk completed this by about 2.45 P.M. At some time after 3 P.M. the judgment creditor served on the bank a garnishee order nisi. The bank contended that by reason of the letter of September 2, transferring the balance and closing the account of their customers, the bureau, and their action thereon, no debt existed as between them, and that there was nothing upon which the order could operate. The Master upheld this contention and gave judgment for the bank.

The judgment creditor appealed.

van den Berg K.C. and *R. F. Levy* for the appellant. The learned Master was wrong in holding that the relation of banker and customer between the bank and the bureau had ceased at the time of the service of the order nisi on the bank. It may be that after the instructions of the bureau to the bank to close the account had been received the bureau could no longer operate the account by drawing cheques on it, etc., but there was still a debt due from the bank to the bureau. The money clearly did not belong to the delegation, for they knew nothing about the transfer and had not accepted it. The money was somewhere, namely, in the bank, and was not res nullius, and could only be that of the bureau. The mere entry of the transaction in the bank's books in due course of business gave no title to the money to the delegation until communicated to and assented to by them—per Bigham J. in *Continental Caoutchouc Co.* v. *Kleinwort, Sons & Co.* (1)—and the bureau could have

(1) (1903) 8 Com. Cas. 277, 283.

countermanded their instructions to the bank at any time before such communication and acceptance: *Williams* v. *Everett.* (1) The Master misunderstood the decision in *Roberts* v. *Jones* (2), which was based on the fact that by reason of a previous transaction no debt existed between the garnishee and the judgment debtor.

[*Joachimson* v. *Swiss Bank Corporation* (3) was also referred to.]

Somervell K.C. and *Harold Murphy* for the respondents. When the bank received the letter from the bureau closing the account and transferring the amount of it they ceased to owe anything to the bureau. No doubt the bureau could have revoked the authority to transfer at any time before communication to the delegation, and in that event the money would have returned to the account of the bureau and the relation of banker and customer would have been restored between them and the bank; but the bureau did not revoke the authority. Or, if the delegation had refused to accept the transfer the same result would have followed.

[ACTON J. The closing of a customer's account with his bank does not put an end to the bank's liability to the customer.]

No, unless there is also a direction to transfer the amount. If at 3 o'clock the delegation had asked the bank to pay them the sum transferred, the bank would have been compelled to comply. That is inconsistent with the contention that at that time there was a debt due from the bank to the bureau. The case of *Continental Caoutchouc Co.* v. *Kleinwort, Sons & Co.* (4) turned on the fact that an initial mistake was made when the money was paid in.

[*Berry* v. *Halifax Commercial Banking Co., Ld.* (5), was also referred to.]

van den Berg K.C. replied.

ACTON J. In this case the question is whether at the material time the bank was indebted to the bureau as their

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(1) (1811) 14 East, 582, 597.
(2) 61 L. J. (Q. B.) 523.
(3) [1921] 3 K. B. 110, 121.
(4) 8 Com. Cas. 277.
(5) [1901] 1 Ch. 188.

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customers to the amount of a credit balance standing to the account of the bureau at the bank. That account was opened at the bank by the bureau by means of a letter from Berlin dated August 21, 1930. There is, unfortunately, a difficulty at the outset as to the correct meaning of that letter, which was in Russian. It appears to be doubtful whether the right thereby conferred upon certain persons named in it was merely to " draw upon " the current account of the bureau or to " deal with " that account or to " manage " it. The material clause must, therefore, be read as follows : " The right to draw on or deal with or manage the current account of the bureau is the right of the chief of the trade delegation of the U. S. S. R. in Great Britain and the chairman in succession of the bureau in London, Comrade Bron, and vice-chairman of the bureau, Comrade Orlovsky. Owing to the departure of Comrade Orlovsky to the Kara Sea Expedition the authority to draw on or deal with or manage the current account of the bureau is given without further notice to Comrade Potechin, the manager of the bureau in London, whose signature is hereby confirmed," and there follows the signature of this Potechin as acting chief of the trade delegation in Germany, and another signature. It is probable, I think, although I do not know, that the person to whom the words " acting chief of the trade delegation in Germany " apply is Kilevetz, and not Potechin ; but, however that may be, it is not of any very great importance. On August 25, 1931, a letter was written by Orlovsky to the bank as follows : " Owing to the departure of the vice-chairman of the bureau at London, Comrade Orlovsky, to the Kara Sea Expedition of 1931, herewith I am informing you that the right to draw on the current account in your bank is given to the marine superintendent, who is also acting as vice-chairman of the bureau, Comrade Robert Rudolphovitch Getze." That was signed, " Getze Robert." " Confirming this vice-chairman bureau Komseverputj, P. Orlovsky." On September 2, a letter signed by this man, Getze, on behalf of the bureau was at 1.45 P.M. handed by him to the manager of the bank. It was as follows : " To the Bank for Russian Trade. We

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hereby request you to transfer the amount which you hold in our current account to the current account of the trade delegation of the U. S. S. R. in Great Britain, and to close our current account. Bureau Komseverputj Northern Sea Route Bureau," signed "Getze." The delegation are, we are told, a body enjoying diplomatic immunity. Thereupon, on the instructions of the bank manager, a Mr. Kerr, a clerk employed by the bank, made inquiries as to the balance of the account and calculated interest upon it, made entry of the result in the books of the bank, and also made out a debit slip showing a transfer of the balance so calculated amounting to upwards of 9000*l.* to the delegation. This had been done before 3 P.M., and between 3 o'clock and 3.15 P.M. the bank was served with a garnishee order which had that day been obtained by one Rekstin, a judgment creditor of the bureau. It was admitted that the delegation had no notice before this of what had been done by the bank. There was nothing to show that the delegation knew that anything of the kind had been done or was in contemplation, nor that the delegation had ever agreed to this transfer or consented to accept it. There was, moreover, nothing to show or to suggest that the delegation had any claim or right to the balance standing to the credit of the bureau or to any part of it.

The first contention for the judgment creditor was that Orlovsky could not give any authority to Getze either to draw on or deal with or manage the account: "Delegatus non potest delegare." The second was that, even if this was not so, Getze could not in any way have any authority to instruct the bank to close the account and transfer the whole of the credit balance to a third party without communicating with his principals and obtaining their assent, for it is said that authority to "draw on" or "deal with" or "manage" the current account of the bureau cannot go so far as to authorize an act so drastic and far-reaching as the closing of that current account and the transfer of the whole of the credit balance to a third party, especially if there is nothing to show that that third party has any sort of right or claim thereto. If it were necessary for the decision of this case, I should find that upon the evidence before the Master this contention is well founded and ought to prevail. The point, however, upon which I think the judgment creditor is entitled to succeed is that what was done by the bank was, as the Master decided, mere internal machinery for recording what was to be done by the bank on the instructions of Getze as between themselves and their customers, the bureau, and that there could be no transfer of the customers' money until the proposed transferees had received notice of and had assented to the moneys in question being transferred to them. In support of these propositions there was cited the case of *Williams* v. *Everett*, per Lord Ellenborough (1): "It is entire to the remitter to give, and countermand, his own directions respecting the bill as often as he pleases, and the persons to whom the bill is remitted may still hold the bill till received, and its amount when received, for the use of the remitter himself, until by some engagement entered into by themselves with the person who is the object of the remittance, they have precluded themselves from so doing, and have appropriated the remittance to the use of such person. After such a circumstance, they cannot retract the consent they may have once given, but are bound to hold it for the use of the appointee." To the like effect is the case of *Morrell* v. *Wootten* (2), where the Master of the Rolls, Sir John Romilly, said: "If so, there is nothing more in the case than this: an order given by a man to a banker to pay over a sum to a third person, the banker does not do it, and the order is countermanded. Can the third party insist on the banker paying him the money? I am of opinion that this was a mere naked authority to pay, which Parker had the power of revoking if he thought fit—he did revoke it on March 3; and this fund therefore forms general assets to be distributed amongst Parker's creditors." I do not think it is necessary to read the headnote; that is the material passage in the judgment. Finally, in the case of the *Continental Caoutchouc Co.* v. *Kleinwort, Sons & Co.* (3), Bigham J. said, in giving

(1) 14 East, 582, 597. (2) (1852) 16 Beav. 197, 204.
(3) 8 Com. Cas. 277, 283.

judgment: "Then, can the plaintiffs recover back the money from the defendants? I think they can. Certainly, before the defendants had advised Kramrisch & Co. that the money had been credited to their account, it was money in the defendants' hands to the plaintiffs' use. The mere entering of the money to the credit of Kramrisch & Co. by the defendants in their own books gave no title either to the defendants or to Kramrisch & Co. Such entry bound no one." I again do not read the headnote containing the facts in that case, but that passage seems to me to be absolutely in point in the present case.

At the time, therefore, when the garnishee order was served on the bank, the bank in my opinion still held the credit balance for the use of the bureau, and there was a debt from the bank to the bureau as their customer. The case of *Roberts* v. *Jones* (1) seems to me to have been misunderstood by the learned Master. The point of that case, in my opinion, is that at the time the garnishee order was served upon the garnishee the facts showed that there was no debt from that person to the judgment debtor and never had been. The case has, therefore, no application where there was, as here, admittedly a debt from the bank to the bureau on the morning of September 2, 1931, and the facts show that the debt had not ceased to exist before the service of the garnishee order. On the other hand, as was said by Bankes L.J. in *Joachimson* v. *Swiss Bank Corporation* (2): "The effect of the service of a garnishee order nisi is, according to Lord Watson in *Rogers* v. *Whiteley* (3), to make the garnishee 'custodier for the Court of the whole funds attached.' The service of such an order is, in my opinion, a sufficient demand by operation of law, to satisfy any right a banker may have as between himself and his customer to a demand before payment of moneys standing to the credit of a current account can be enforced."

I think that this appeal should be allowed and that the garnishee order should be made absolute.

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(1) 61 L. J. (Q. B.) 523.
(2) [1921] 3 K. B. 110, 121.
(3) [1892] A. C. 118, 122.

TALBOT J. I am of the same opinion. The plaintiff, Mr. Rekstin, had a judgment for 2500*l.*, and costs, against the judgment debtors, the bureau, and in order to satisfy that judgment he took garnishee proceedings against the Bank for Russian Trade, Ld., alleging that they owed the judgment debtors a considerable sum of money, more than enough to satisfy his judgment; and the question which arose in the course of those proceedings was whether when the garnishee order nisi was served on the garnishee there was a debt due from them to the judgment debtors. The answer to that question depends on certain facts which can be very shortly summarized. At midday, to take a safe hour, on September 2, 1931, the judgment debtors had an account with the bank in which there was a balance standing to their credit of 9194*l.* 16*s.* 5*d.*, and between 3 o'clock and a quarter past three on the same day the garnishee order nisi was served on the bank. The bank's contention is that before that service was effected the debt which they owed to the judgment debtors in the early part of the same day had ceased to exist, and they seek to prove that by the letter which has been read, dated the same day, September 2, 1931, and which was delivered to them by hand at 1.45 P.M. on the same day. Upon the receipt of that letter one of the clerks of the bank, who is described as the current accounts clerk, took steps, which I will describe in the words of the learned Master. This clerk (Mr. Kerr) "made the inter-departmental inquiries, interest calculation and book entries necessary for the purpose of closing the judgment debtor's account, and in addition the slip showing the transfer of the calculated balance of 9194*l.* 16*s.* 5*d.* to the account of the trade representation of the U. S. S. R. in Great Britain. Mr. Kerr completed the whole process by about 2.45 P.M. and definitely before 3 P.M. on September 2, 1931." Then the learned Master states the service of the garnishee order nisi and says that he is satisfied that service was not effected before 3 o'clock nor later than a quarter past three, and he adds: "Within a few minutes of the service," and it is clear that means after the service, "of the order nisi, Mr. Kerr drew a line under the last entry in the book containing the judgment debtor's account. Later in the afternoon entries were made in the plaintiffs' books containing the account of the trade representation of the U. S. S. R. in Great Britain, including a credit of 9194*l.* 16*s.* 5*d.*, being the transfer from the judgment debtors' account." These findings of the learned Master, including his findings as to the details of the time at which the various events happened, are not challenged.

Now it is quite obvious there was a close connection between the trade delegation and the bureau, whose head office is in Russia, and the bureau is described, as I read the copy that we have, as a department of the delegation or representation, and its London offices are in the same building as the bank. It being admitted that an hour or so before service of this order there was a substantial sum standing to the credit of the judgment debtors with the bank, it is alleged that the whole was transferred to the credit of the delegation (a body whose members are said to enjoy immunity as being in the diplomatic service of the Russian Government) just in time to defeat the order, and it is necessary, therefore, to see whether this was in fact effected.

Two questions are involved: firstly, was there an instruction to close the account and transfer the balance authorized by the judgment debtors; secondly, if there was, was it executed so as to put an end to the bank's debt to the judgment debtors before service of the order? The first question depends on the three letters of August 21, 1930, August 25 and September 2, 1931. As to the letter of August, 1930, which is in Russian, it appears that different translations of it are in existence and were used before the Master. In some of these the words "draw on" the account are used; in others it is "manage" or "deal with." It was agreed by counsel that all these could equally well represent the Russian word used, and it seems, therefore, that it cannot be said that the use of the words "manage" or "deal with" enlarges the words "draw on." In my opinion, the only authority conferred by the letter of August 21, 1930, was to operate the account in the ordinary business sense of the word, and did not include any right to close it and transfer the balance to the account of another; and I should be of the same opinion if the letter were in English and used the word "manage" or the words "deal with."

If this is right it is unnecessary to consider whether Getze derived any authority in reference to the account from the letter of August 25, 1931, which was written in the first person by Mr. Orlovsky, who was mentioned in the letter of August, 1930. So far as appears, Orlovsky was merely the agent of the bureau and had no power to delegate his authority to operate this account. It may be observed that in August, 1930, power to operate the account in Orlovsky's absence in the year before the events which are material to this case was conferred until further notice not by Orlovsky or by the bureau, but by the acting chief of the trade delegation in Germany. There was accordingly, in my opinion, no sufficient evidence that the letter of September 2, 1931, on which the bank's case depends and which was signed in the name of the bureau by Getze, was authentic. Assuming, however, that it was authentic, what was its effect? It directs the bank to do two things: firstly, "to transfer the amount which you hold in our current account to the current account of the trade delegation," and, secondly, "to close our current account." It is plain that a mere closing of an account does not discharge or cancel the bank's debt to the customer; the bank owe him the balance until they have paid it either to him or, by his order, to some one else. If, therefore, the letter of September 2 cancels the debt in question it must have been by the direction to transfer the balance of the account. What does the transfer of a bank account from one customer to another mean in the absence of an actual assignment? It means that the bank, by the customer's order, pay the balance of the account to the transferee and then borrow it from him; the bank then becomes the transferee's debtor as they were before the transferor's. How can this contractual relation between the bank and the transferee be established without notice to and assent by the transferee ?—until it is established that the bank owe money to the transferee, and are bound to pay it to him on demand. This may be stated by saying that the order to transfer is revocable until the transferee assents to it. But in truth the bank never ceases to owe the money to the transferor until they have actually disposed of it according to his instructions ; that is, paid it to the transferee and borrowed it from him. It is quite clear that this cannot be done by mere entries in the bank's books without communication with the transferee ; if it could, there would be an interval during which the bank would owe the money to no one, not to the transferor, because the debt to him would on the hypothesis be cancelled, nor to the transferee, because there would be no privity between him and the bank. In my opinion, therefore, even if the bureau are to be taken to have given the instructions contained in the letter of September 2, 1931, that did not operate to cancel or terminate the debt before service of the order nisi. This conclusion appears to me to be inevitable when the facts are understood, upon the principles which were illustrated and applied in the leading case of *Williams* v. *Everett* (1) and in *Continental Caoutchouc Co.* v. *Kleinwort, Sons & Co.* (2), relied upon by counsel for the appellant. The latter case is, in my opinion, a direct authority in favour of the judgment creditor. It lays down as undoubted law that the mere entering in the banker's books of a sum of money to the credit of A. in consequence of a customer's request to the banker to credit the money to A. gives no title to A. and leaves the money still in the banker's hands to the customer's use. The case decides this none the less because it also decided that the notification of the credit to A. which would have otherwise effected the transfer of the money to the use of A. was in the circumstances without that effect, because A. knew that the customer's request to the banker had been made by mistake ; and I may add that neither of the very eminent counsel who argued that case appears to have suggested that the credit in the banker's

(1) 14 East, 582.

(2) 8 Com. Cas. 277.

books would have had any effect at all without notification of it to A. In *Roberts* v. *Jones* (1), which was relied upon for the bank, there was held to be no debt to garnish, because by a prior transaction the money balance which it was sought to attach had been paid by the judgment debtor to a trustee for his creditors, and no balance had been claimed back by the judgment debtor, and there was consequently in the opinion of the Court no debt due from the trustee to the judgment debtor which could be attached. I am unable to see that that case helps the bank. If it has any bearing on the present case, it seems to me to support the judgment creditor.

For these reasons I agree that the learned Master should have given judgment for the judgment creditor, and that the appeal should be allowed.

Appeal allowed.

W. L. L. B.

The bank appealed. The appeal was heard on June 23, 24, 1932.

Somervell K.C. and *Harold Murphy* for the appellant.
van den Berg K.C. and *R. F. Levy* for the respondents.

LORD HANWORTH M.R. This is an appeal from a decision of the Divisional Court as to the operation of a garnishee order nisi on the judgment debtor's banking account served after the bank had been instructed to transfer the account to the account of the delegation.

On July 25, 1931, the plaintiff recovered judgment against the bureau for 2500*l.*, and on September 2, 1931, he obtained a garnishee order nisi ordering that debts owing from the bank to the bureau should be attached to a sum not exceeding 2510*l.* to answer a judgment recovered for 2500*l.* damages and costs to be taxed. On September 15, 1931, it was directed that an issue, in which the garnishees were to be plaintiffs and the judgment creditor the defendant,

(1) 61 L. J. (Q. B.) 523.

should be tried of whether the garnishees had at any material time any account in the name of the bureau. Subsequently an order was made varying the issue by substituting the question whether there were at the material time any debts due or accruing due from the bank to the judgment debtors.

The Master heard the case and went fully into the facts. Finally, on November 27, 1931, he made an order discharging the garnishee order nisi. On December 10, 1931, notice of appeal was given to the Divisional Court which asked for an order that the decree of the Master should be reversed and the garnishee order made absolute. On April 25, 1932, the Divisional Court heard the appeal, and held that there was at the material time a debt owing from the bank to the bureau upon which the garnishee order could operate. The appeal from that decision is made to this Court.

The facts are admirably stated by Master Burnand as follows:

"By a letter dated August 21, 1930, an account was opened at the plaintiff bank in the name of the judgment debtors, and that account was to be managed by the persons named in the letter. It appears that Mr. P. O. Orlovsky, the vice-chairman of the judgment debtors, was usually absent from London for a time about the month of September each year, and having regard to the imminence of such absence in 1930 the plaintiff bank was required in respect of the account so opened to honour the signature of a Mr. Potechin, whose specimen signature was supplied. It appears to me that thereafter the Mr. Bron or the Mr. Orlovsky named in the letter of August 21, 1930, might properly require the plaintiffs to honour the signature of some other named person in matters concerned with the management of the account without reference to those persons who actually opened the account. By a letter dated August 25, 1931, the same Mr. Orlovsky required the plaintiffs to honour the signature of Mr. R. R. Getze in respect of the said management, and thereafter Mr. Getze signed cheques drawn on the account, and in so far as it is a question of fact I find that he had authority for so doing. It follows that a refusal by the plaintiffs to honour Mr. Getze's signature on a cheque drawn on the account or his instructions relating to the management of the account would have been a breach of their duty as bankers.

The offices of the judgment debtors were in the same building as the plaintiff bank, and during the week ending September 2, 1931, cheques were drawn on the account by Mr. Getze and were duly honoured by the plaintiffs without objection by the judgment debtors. Having regard to the proximity of the offices their failure to take the opportunity that I find they had, to object to the plaintiffs' honouring Mr. Getze's signature, was tantamount to ratification of the instructions contained in the letter of August 25, 1931, if any such ratification was required.

On September 2, 1931, a letter from the judgment debtors bearing that day's date and signed by Mr. Getze was at about 1.45 P.M. and certainly before 2 P.M. handed by Mr. Getze to Mr. Kours, the plaintiffs' manager. That letter was an instruction to the plaintiffs to close the judgment debtors' account and to transfer the balance to the account then held by the plaintiffs in the name of the Trade Representation of the U. S. S. R. in Great Britain, a body having diplomatic immunity. That instruction was accepted by Mr. Kours and acted upon in that Mr. Kerr, the plaintiffs' current accounts clerk, made the inter-departmental inquiries, interest calculations, and book entries necessary for the purpose of closing the judgment debtors' account, and in addition made out the slip showing the transfer of the calculated balance of 9194*l.* 16*s.* 5*d.* to the account of the Trade Representation of the U. S. S. R. in Great Britain. Mr. Kerr completed that whole process by about 2.45 P.M. and definitely before 3 P.M. on September 2, 1931. The judgment debtors never revoked that instruction.

The garnishee order nisi dated September 2, 1931, was served upon the plaintiffs on that same day. The evidence tendered differed as to the exact time when service was effected, but I am satisfied that service was not effected before 3 P.M. and not later than 3.15 P.M.

Within a few minutes of the service of the order nisi Mr. Kerr drew a line under the last entry in the book containing the judgment debtors' account.

Later in the afternoon entries were made in the plaintiffs' books containing the account of the Trade Representation of the U. S. S. R. in Great Britain, including a credit of 9194*l.* 16*s.* 5*d.*, being the transfer from the judgment debtors' account.

Certain periodical payments which before that date had been made by cheques drawn on the judgment debtors' account were thereafter made by cheques drawn on the account of the Trade Representation of the U. S. S. R. in Great Britain.

No evidence was tendered to prove that on September 2, 1931, the judgment debtors were under any liability to pay to the Trade Representation of the U. S. S. R. in Great Britain the sum of 9194*l.* 16*s.* 5*d.* or any sum. On the contrary Mr. Kerr gave evidence, and I accept it, to the effect that so far as he could judge there was nothing which would justify such payment.

It has been submitted by counsel for the defendants that the letter of instruction dated September 2, 1931, signed by Mr. Getze lacked the authority of those responsible for the judgment debtors' account, and that therefore the transfer of any balance standing to the credit of the judgment debtors made in pursuance of such letter was of no effect and could not properly be made without confirmation by other persons. I am unable to accept that proposition, and am of opinion that the authority of Mr. Getze was one upon which the plaintiffs were bound to act.

It is necessary to consider what was the position of the plaintiffs when Mr. Kours, their manager, received that letter of instruction. The letter contained a notice to the plaintiffs of an intention to close the account and also an instruction calling upon the plaintiffs to transfer the balance to the credit of the account then held by them in the name of the Trade Representation of the U. S. S. R. in Great Britain." Then the Master holds as follows: "In

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my opinion that notice brought to an end the relation of banker and customer and further the plaintiffs were under a duty to transfer the balance in accordance with the instruction. The notice of either banker or customer of an intention to close an account is sufficient to bring to an end the relation of banker and customer, and after closing an account a banker is the agent of the customer to deal with the balance. In so acting a banker is bound to follow the usual course of business, and in case of neglect to do so is responsible for any loss attributable to his omission.

It appears to me that the procedure adopted by the plaintiffs as to entries, etc., as carried out by Mr. Kerr was merely their internal machinery for recording the fact that the account was closed by reason of the acceptance of the notice.

In my opinion the notice was revocable by the judgment debtors until such time as the Trade Representation of the U. S. S. R. in Great Britain might be informed of and assent to the moneys being placed to the credit of their account. The same sort of position arose in the case of *Williams* v. *Everett* (1), Lord Ellenborough being reported (2) as stating: 'It is entire to the remitter to give, and countermand . . . . as often as he pleases . . . . until by some engagement entered into by themselves with the person who is the object of the remittance, they have precluded themselves from so doing.'

So in the case of *Morrell* v. *Wootten* (3) it was laid down that where A., having money in the hands of B., directs B. to pay it to C., and B. consents so to do and the direction is communicated to C., a third party, the transaction is complete. It is said in the present case that there was no communication to the Trade Representation, and therefore that as the transaction was not completed it is of no effect. It is, however, to be borne in mind that in *Morrell* v. *Wootten* (4), as pointed out by the Master of the Rolls, the Court was concerned with the rights of C., the third party, to enforce

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(1) 14 East, 582.
(2) Ibid. 597.
(3) 16 Beav. 197.
(4) Ibid. 203.

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the payment to him by B., and not, as in the present case, with the duty of the plaintiffs to make the transfer.

Again in *Continental Caoutchouc Co.* v. *Kleinwort, Sons & Co.* (1), where the rights of the plaintiffs as against their bankers were being considered, it is shown that an order for payment is revocable in the circumstances there applicable and resembling for this purpose the facts of the present case. The question then arises whether, as the judgment debtors' mandate to the plaintiffs is revocable by them, the service of a garnishee order nisi upon the plaintiffs operates as a revocation and so has the effect of overriding that mandate. I do not think that an order nisi can have any such effect: see *Roberts* v. *Jones.* (2) In my opinion, therefore, there were not at the material time any debts owing or accruing due from the plaintiffs to the judgment debtors. It follows that the garnishee order nisi should be discharged with costs against the defendant."

When the matter came before the Divisional Court on appeal from this judgment it was held that the mere closing of the account by a book entry did not put an end to the relation of banker and customer when the transferees had no notice of the transfer of the account and had never assented to it.

Three questions arise upon the appeal to this Court: (1.) Is mere notice to transfer an account sufficient to bring to an end the relation of banker and customer? (2.) Is the mandate revocable? and (3.) Was it in fact revoked?

In regard to the first of these questions Talbot J. in giving judgment in the Divisional Court said: "It is plain that a mere closing of an account does not discharge or cancel the bank's debt to the customer; the bank owe him the balance until they had paid it either to him or, by his order, to someone else." This seems to me to be clearly right. I also agree with what was said by Bigham J. in *Continental Caoutchouc Co.* v. *Kleinwort, Sons & Co.* (3): "The mere entry by a clerk in the books can make no difference; such

(1) 8 Com. Cas. 277. (2) 61 L. J. (Q. B.) 523.
(3) 8 Com. Cas. 277, 283.

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an act can neither give any right to the defendants, nor until communicated can it give any right to Kramrisch & Co."

In the light of these cases I ask myself what was the position of the bank in this case after they had received notice to transfer the bureau's account to the account of the delegation and had made the appropriate book entries; and I come without hesitation to the conclusion that to close the bureau's account is not sufficient to bring to an end the relationship between the bank and the bureau of bankers and customer.

The second question is whether the direction to transfer the account was revocable; but I pause before considering that to say that it does not seem possible to question the authority of the gentleman who gave the direction to transfer the bureau's account. Then was the direction revocable?

In *Gibson* v. *Minet* (1) it was held, when A. gave B. an order on his bankers directing them "to hold over from his private account 400*l.* to the disposal of B." and the bankers accepted the order, that "such order was revocable, and might be countermanded before payment made to B., or appropriation to his credit." If that be applied to the present case, it appears that whatever was done on September 2 before 3 o'clock was the mere making of book entries to give effect to the transfer of the bureau's account and nothing amounting to a payment to the delegation or an appropriation to their credit. In that case there was an appeal, and Best L.C.J. said (2): "I perfectly accede to the case cited" [*Williams* v. *Everett* (3)], "but I see no pretence for disturbing this verdict"; and the reporter calls attention in a note to an earlier case of *Lyte* v. *Peny* (4), and says: "In the case of *Lyte* v. *Peny* (4) it was held, that if a man bail money to another, to the use of a third, and to be delivered on the day of marriage, he may countermand it at any time before delivery over." In another report of *Gibson* v. *Minet* (5) there is a note at the end of the case (6) on *Williams* v. *Everett* (3) where it is stated: "The Court

(1) (1824) Ry. & Moo. 68.
(2) Ibid. 71.
(3) 14 East, 582, 597.
(4) (1541) Dyer, 49a.
(5) (1824) 1 Car. & P. 247.
(6) Ibid. 250.

held, that under these circumstances, the plaintiff could not maintain any action for money had and received, against the defendants, there being no privity of contract, express or implied, between them, Lord Ellenborough saying, 'by the act of receiving the bill, the defendants agree to hold its contents, when paid, for the . . . . remitter. The remitter may give and countermand his directions, so often as he pleases, and the persons to whom it was remitted, may hold the bill, or its amount, for the use of the remitter himself, until by some engagement entered into by themselves, with the person who is the object of the remittance, they have precluded themselves from so doing, and have appropriated the remittance to the use of such person. After such a circumstance, they cannot retract the consent they have once given.'" *Morrell* v. *Wootten* (1) contains observations to the same effect. There Sir John Romilly M.R. said: "There is nothing more in the case than this: an order given by a man to a banker to pay over a sum to a third person, the banker does not do it, and the order is countermanded. Can the third party insist on the banker paying him the money?" And he holds that there was a mere naked authority to pay which could be revoked.

In *Brind* v. *Hampshire* (2): "A resident abroad, remitted a bill to B, his agent in England, 'drawn by A, and specially endorsed by him to C, with whom his children were at school, in payment of C's account for their board and education.' B got the bill accepted by the drawees and sent a letter by post to C, stating that he had received a commission from A to pay her some money on account of his children, and desired to be informed when and how it should be delivered. While the bill remained in B's hands, he received directions from A to keep it, and the proceeds in his hands." B having retained the bill, it was held that C could not recover it in trover. There Parke B. said (3): "With regard to the communication made by the defendant to the plaintiff, even supposing it to have been that he held the bill itself for his use, that

(1) 16 Beav. 197, 204.
(2) (1836) 1 M. & W. 365.
(3) (1836) 1 M. & W. 372.

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would not have the effect of transferring the property: the direction remains countermandable by the remitter until it is executed, either by the actual delivery of the chattel or money to the remittee, or by some binding engagement entered into between the agent and the remittee, which gives the latter a right of action against the former."

I need not refer to the other judgments in that case, but the cases I have referred to show that *Gibson* v. *Minet* (1) is good law, and that in a case like the present the power to revoke the direction to transfer the account was still in existence when the garnishee order was served.

The third question then is, was there any revocation?

In *Rogers* v. *Whiteley* (2), a case where a garnishee order was served on a banker attaching his debts to a customer, Lindley L.J. said (3): "No doubt in one sense the attachment is only a security for the payment of money, but the question is what effect the order has on the person on whom it is served. It seems to me that effect cannot be given to the words of the order unless by saying that it prohibits the person affected by it from parting with the money attached so long as the order is in force." That case went to the House of Lords (4), and Lord Halsbury said (5): "The order appears to me to have been in such terms that it would have been a disobedience to the order on his part if he had paid anything after it had been served upon him. That being so it disposes of that part of the case which raised the question whether he was bound to pay while that order was in force. I think he was not." That judgment clearly shows that the garnishee order nisi had cancelled the effect of the order to pay. In the same case Lord Watson says (6): "The effect of an order attaching 'all debts' owing or accruing due by him to the judgment debtor is to make the garnishee custodier for the Court of the whole funds attached; and he cannot, except at his own peril, part with any of those funds without the sanction of the Court." That is a direct authority that the garnishee order nisi attaches the fund in the hand of the banker and acts as a revocation of any direction given by the judgment debtor in regard to the disposition of the fund.

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(1) Ry. & Moo. 68; 1 Car. & P. 247.
(2) (1889) 23 Q. B. D. 236.
(3) Ibid. 238.
(4) [1892] A. C. 118.
(5) Ibid. 121.
(6) Ibid. 122.

In *Joachimson* v. *Swiss Bank Corporation* (1) observations are made which accord with the decision in *Rogers* v. *Whiteley*. (2) That case decided that when money is standing to the credit of a customer on current account with a banker, a demand by the customer was a necessary ingredient in the cause of action against the banker for money lent. Bankes L.J. said (3): "It has been suggested that a decision to this effect would run counter to a line of authorities which have recognized and allowed garnishee proceedings in reference to amounts standing to a customer's credit on his current account, upon the ground that such amounts were debts capable of being attached. I do not agree with this suggestion. The effect of the service of a garnishee order nisi is, according to Lord Watson in *Rogers* v. *Whiteley* (4), to make the garnishee 'custodier for the Court of the whole funds attached.' The service of such an order is, in my opinion, a sufficient demand by operation of law." In other words the garnishee order nisi has operation in law and revokes any direction given in regard to the fund which has not been carried out. In the same case Warrington L.J. said (5): "It may be suggested that the view we take is inconsistent with the operation of a garnishee order upon a banking account. I do not think so. In my opinion, the service of the order nisi would be a sufficient demand."

It appears to me that the House of Lords have definitely held that a garnishee order nisi revokes any order to transfer which has not been fully carried out.

I only wish to add a word about *Roberts* v. *Jones*. (6) There the defendant, a judgment debtor, had previous to judgment assigned to a third party a sum of money under a deed of arrangement under which the third party was to retain from the sum so assigned rent due to himself, and to hold the balance for the benefit of the defendant's creditors. This arrangement was communicated to the defendant's local creditors, but not to the plaintiff, the judgment creditor. The plaintiff sought under a garnishee order to attach the sum so held by the third party. The Divisional Court, consisting of Mathew and Collins JJ., held that the mandate to the third party was revocable, but that no revocation having been made by the debtor, there was no debt, legal or equitable, which could be the subject of attachment. There Collins J. said (1): "The sum sought to be attached is in the hands of a person constituted a trustee of the creditors of the defendant under a mandate from the latter to employ the money in a particular way. The judgment creditor here is seeking to attach money which but for his interference would be distributed rateably among other creditors. This cannot be done unless we hold that the garnishee order overrides the mandate of the debtor and has the effect of a revocation"; and he goes on to hold that "the creditor cannot exercise the revocation against the debtor's expressed desire. Assuming the right but that it has not been exercised by the debtor, I hold that no garnishee order can, ipso facto, revoke the authority of the debtor's agent."

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(1) [1921] 3 K. B. 110.
(2) [1892] A. C. 118.
(3) [1921] 3 K. B. 121.
(4) [1892] A. C. 118, 122.
(5) [1921] 3 K. B. 126.
(6) 61 L. J. (Q. B.) 523.

It is important to observe that *Rogers* v. *Whiteley* (2) was not brought to the attention of the Court. The case of *Hutt* v. *Shaw* (3), which was then referred to by Collins J. as being directly in point, rested on the fact that there was never a debt owing from the garnishee, who was a stockbroker, to the judgment debtor. In my opinion the observations of Collins J. do not hold good at the present time.

I agree with the decision of the Divisional Court in the present case, and for the reasons I have stated I have come to the conclusion that the appeal must be dismissed.

SLESSER L.J. On September 2, 1931, a garnishee order nisi was obtained by the judgment creditor directing that

(1) 61 L. J. (Q. B.) 525.
(2) [1892] A. C. 118.
(3) (1887) 3 Times L. R. 354.

debts owing by the bank to the bureau should be attached to a sum not exceeding 2510*l.* to answer a judgment recoverable by the judgment creditor under a judgment of the King's Bench Division, dated July 25, 1931, 2500*l.* damages and costs. That order was served on the bank not earlier than 3 P.M. or later than 3.15 P.M. on the same day. An issue was subsequently directed to be tried "whether there were at the material time any debts due or accruing due from" the bank "to the judgment debtors." That issue has been decided by the Master, who held that while the bureau's direction to the bank to transfer their account was revocable by them, the service of a garnishee order nisi upon the bank did not operate as a revocation, with the result that at the material time there was no debt on which the garnishee order nisi could take effect. The Divisional Court took a contrary view.

The problem we have to decide is whether on the facts of the case there was still subsisting when the garnishee order nisi was served a debt due from the bank to the bureau on which the order could operate. [His Lordship then stated the facts in regard to the letter directing the transfer of the bureau's account to the delegation, and continued :] It is clear that the direction to the bank did not operate as a bill of exchange, for under s. 3, sub-s. 2, of the Bills of Exchange Act, 1882, an instrument which orders any act to be done in addition to the payment of money is not a bill of exchange. But at the same time cases relating to bills of exchange are of importance in connection with the first question.

According to the Master the position before 3 o'clock on September 2, 1931, was that the process of transferring the bureau's account and of closing their account with the bank had been completed. I have, however, come to the conclusion that between 3 and 3.15 P.M. the direction given to the bank was still revocable and that nothing had been done to prevent the debtor from revoking it. I do not, however, think it necessary to refer again to the cases establishing this which have been referred to by the Master of the Rolls. It remains to consider whether the garnishee order nisi

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operated as a revocation of the direction, there having been no revocation of the direction by the judgment debtors themselves. It is decided in *Rogers* v. *Whiteley* (1) that a garnishee order nisi attaching a debt owing from a bank to its customer prevented the bank from parting with the money attached as long as the order was in force. The essential point here, however, is whether the order nisi by itself operated when served as a revocation of the direction to transfer the account. That point was really, I think, a matter decided in *Joachimson* v. *Swiss Bank Corporation.* (2) In that case the problem was whether when money was standing to the credit of a customer on current account with a bank, a demand by the customer for payment was necessary before an action for money lent could be brought. The question had arisen in earlier cases in relation to the Statutes of Limitation. In *Joachimson's* case (2) it was argued that to hold that a demand for payment was necessary to create a debt would be inconsistent with the decision that "a garnishee order may issue attaching money on current account . . . . as a debt owing to the customer." It is true that the point was decided obiter, but Bankes L.J. said (3): "It has been suggested that a decision to this effect would run counter to a line of authorities which have recognized and allowed garnishee proceedings in reference to amounts standing to a customer's credit on his current account, upon the ground that such amounts were debts capable of being attached. I do not agree with this suggestion. The effect of the service of a garnishee order nisi is, according to Lord Watson in *Rogers* v. *Whiteley* (4), to make the garnishee 'custodier for the Court of the whole funds attached.' The service of such an order is, in my opinion, a sufficient demand by operation of law, to satisfy any right a banker may have as between himself and his customer to a demand before payment of moneys standing to the credit of a current account can be enforced." And Warrington L.J. said (5):

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(1) 23 Q. B. D. 236; [1892] A. C. 118.

(2) [1921] 3 K. B. 110, 114.

(3) [1921] 3 K. B. 121.

(4) [1892] A. C. 122.

(5) [1921] 3 K. B. 126.

"It may be suggested that the view we take is inconsistent with the operation of a garnishee order upon a banking account. I do not think so. In my opinion, the service of the order nisi would be a sufficient demand." In the same way Atkin L.J. said (1): "The service of the order nisi binds the debt in the hands of the garnishee—that is, creates a charge in favour of the judgment creditor. If the bank disputes that the amount is payable, there is ample power to provide for a demand being made before an order for payment is made. Possibly the order nisi in itself operates as such a demand."

This case shows clearly that a garnishee order will operate as a demand. Can it then operate as a revocation of the customer's direction to transfer his account ? In my opinion it can. It may be said that this is inconsistent with *Roberts* v. *Jones.* (2) I agree that in principle there is no difference between that case and the present one ; but I think it should not be followed. In my view we may disregard that decision and hold that the order nisi in the present case operated to revoke the direction by the bureau to transfer their account to the delegation. I agree then that the appeal must be dismissed.

ROMER L.J. I agree, and I have very little to add to what has already been said by the Master of the Rolls and Slesser L.J. At the time the letter was written to the bank instructing it to transfer the bureau's account to the delegation and to close the bureau's account, the garnishee order nisi would have been effectual to attach that account to answer the bureau's debt to the judgment creditor. I will not refer to the authorities which establish this. If the order nisi were not effective it would never be possible to garnishee a debtor's current account. When the order nisi was received by the bank the position had not really very much altered. Assuming that the letter was a valid instruction to the bank to transfer the account, it operated as no more than a revocable mandate to the bank, so that until

(1) [1921] 3 K. B. 131.

(2) 61 L. J. (Q. B.) 523.

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it was acted upon, it was open to the bureau to revoke it. In fact the bureau did not itself revoke it, and the question is whether the service of the order nisi operated as a revocation. In my opinion it certainly did. The judgment of the Divisional Court was right on this point, and the appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for the bank: *Wynne-Baxter & Keeble.*
Solicitors for the judgment creditor: *Warren & Warren.*

H. C. G.

Rex v. *Middlesex Justices. Ex parte Bond*
[1933] 1 K. B. 72.
Distinguished. BURMAN *v.* WOODS
[1948] 1 K. B. 111

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THE KING *v.* MIDDLESEX JUSTICES.

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Husband and Wife—Petition by Husband for Divorce—Appearance by Wife—Decree absolute—Application by Wife to Justices for Custody and Maintenance of Child refused—Order on renewed application—Res judicata—Jurisdiction of Divorce Court—Certiorari—Guardianship of Infants Act, 1886 (49 *&* 50 *Vict. c.* 27), *s.* 5—*Guardianship of Infants Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 45), *s.* 3, *sub-s.* 2; *s.* 7, *sub-ss.* 1, 3—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 193, *sub-s.* 1—*Matrimonial Causes Rules,* 1924 (*St. R. & O.*, 1924, *No.* 126/*L.* 2), *r.* 34.

In April, 1930, the applicant petitioned for the dissolution of his marriage. His wife appeared, but did not defend the suit. On August 24, 1931, after the decree had been made absolute, the wife applied to a court of summary jurisdiction for an order under s. 5 of the Guardianship of Infants Act, 1886, as amended by s. 3, sub-s. 2, and s. 7, sub-s. 1, of the Guardianship of Infants Act, 1925, for the custody and maintenance of a child of the marriage. It was pointed out to the Bench that the marriage of the parties had been dissolved, and that the wife having appeared was entitled under r. 34 of the Matrimonial Causes Rules, 1924, to be heard in the Divorce Court on questions as to the custody of children of the marriage. The chairman said: "If that is the case we think the application should be made there."

On April 11, 1932, the wife renewed her application to the justices, and a differently constituted court made an order giving her the custody of the child and ordering the applicant to pay five shillings weekly for its maintenance while under the age of sixteen.

On an application by the husband for certiorari:—

Held, (1.) that the matter was res judicata by the decision of August 24, 1931, whether that were regarded as a refusal to make an order from which refusal there had been no appeal, or as a decision that the matter was one which "would more conveniently be dealt with by the High Court";

(2.) (per Lord Hewart C.J. and Avory J.; du Parcq J. dubitante), that the jurisdiction of the Divorce Court, when it has become seised of a matrimonial cause, is an exclusive and overriding jurisdiction, and ousts that of the justices under the Guardianship of Infants Acts.

RULE NISI for certiorari.

This was a rule directed to the justices for the Uxbridge Petty Sessional Division of Middlesex, requiring them to show cause why a writ of certiorari should not issue to remove into the High Court, that it might be quashed, an order made on April 11, 1932, whereby the legal custody of one Alick Geoffrey Arthur Bond, an infant, was committed to his mother, Hettie Maud Bond, and whereby his father, William Frederick Bond, was ordered to pay to the said Hettie Maud Bond the sum of five shillings weekly for the maintenance of the said infant while under the age of sixteen years. The grounds for the rule were that the justices had no jurisdiction to make the order (*a*) for the reason that their jurisdiction was exhausted and/or excluded by a previous order made in the same matter by the justices of the same Petty Sessional Division on August 24, 1931, and that the matter was res judicata by reason of that order; (*b*) for the reason that a decree for the dissolution of the marriage of the parties having been made absolute by the Divorce Division of the High Court on May 18, 1931, the jurisdiction of the justices to deal with matters affecting the custody or maintenance of the children of the said marriage was excluded.

The parties were married on April 16, 1919. On December 14, 1920, a girl was born whose custody was not in dispute, and on July 3, 1923, the child Alick Geoffrey Arthur Bond was born. On April 25, 1930, the husband filed a petition for the dissolution of the marriage. The wife entered an appearance, but did not defend the suit, and on November 3, 1930, at Lincoln Assizes, MacKinnon J. pronounced a decree nisi on the husband's petition. On May 4, 1931, the wife made her first application to the justices under s. 5 of the Guardianship of Infants Act, 1886 (1), as amended by s. 3, sub-s. 2, and s. 7, sub-s. 1, of the Guardianship of Infants Act, 1925, asking for the custody and maintenance of the child, but the justices then ruled that as the matter was still pending before the Divorce Court (the decree not having been made absolute), they could not hear the application. On May 18, 1931, the decree was made absolute, and on August 24, 1931, Mrs. Bond renewed her application to the justices. The question was again raised as to the jurisdiction of the High Court, and it was pointed

(1) Guardianship of Infants Act, 1886, s. 5: "The court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent . . . . and may alter, vary, or discharge such order on the application of either parent, ..."

Guardianship of Infants Act, 1925, s. 3, sub-s. 2: "Where the court under the said section as so amended makes an order giving the custody of the infant to the mother, then, whether or not the mother is then residing with the father, the court may further order that the father shall pay to the mother towards the maintenance of the infant such weekly or other periodical sum as the court, having regard to the means of the father, may think reasonable."

Sub-s. 4: "Any order so made may, on the application either of the father or the mother of the infant, be varied or discharged by a subsequent order."

Sect. 7, sub-s. 1: "For the purposes of the Guardianship of Infants Act, 1886, as amended by this Act, the expression 'the court' shall include a court of summary jurisdiction: . . . ."

Sub-s. 3: "Where on an application to a court of summary jurisdiction under the Guardianship of Infants Act, 1886, as amended by this Act, the court makes or refuses to make an order, an appeal shall, in accordance with rules of court, lie to the High Court: Provided that, where any such application is made to a court of summary jurisdiction, and the court considers that the matter is one which would more conveniently be dealt with by the High Court, the court of summary jurisdiction may refuse to make an order, and in such case no appeal shall lie to the High Court."

Supreme Court of Judicature (Consolidation) Act, 1925, s. 193, sub-s. 1: "In any proceedings for divorce . . . ., the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court."

Matrimonial Causes Rules, 1924, r. 34: "After entering an appearance a respondent in a cause may without filing an answer be heard in respect of any question as to costs and a respondent who is husband or wife of the petitioner may be heard also as to custody of or access to children."

out that, Mrs. Bond having appeared to the petition, it was still open to her to apply to the Divorce Court for an order. The chairman then said : " If that is the case, we think the application should be made there," and they refused to make an order. On April 11, 1932, the wife made a third application to the justices, the Bench being differently constituted on this occasion, and the justices made the order which the husband now sought to quash by this rule.

J. F. Compton Miller showing cause for Mrs. Bond. The jurisdiction of the Divorce Court is concurrent with that of courts of summary jurisdiction under the Guardianship of Infants Acts, 1886 and 1925. It has been the practice that courts of summary jurisdiction should not exercise their jurisdiction in a matter which is actually before the Divorce Court ; hence no complaint is made of the justices' first refusal on May 4, 1931. The case of *Vigon* v. *Vigon and Kuttner* (1) seems to have been decided on the footing of a concurrent jurisdiction. In that case the wife had obtained an order for the custody of the child of the marriage from a court of summary jurisdiction. Later the husband was granted a decree nisi for divorce. The petition contained a prayer for the custody of the child, but Bateson J., though he thought that he could vary the order of the court of summary jurisdiction, postponed the drawing up of an order giving custody to the petitioner, in order that the court of summary juridiction might reconsider the matter in the light of the finding of adultery against the wife. It is clear from Bateson J.'s judgment when the matter was first before him (2) that he envisaged the possibility of orders of the Divorce Court and of a court of summary jurisdiction co-existing, with inconvenient results. The matter went to the Court of Appeal (3), which set aside Bateson J.'s order as being inchoate merely, and dependent on the magistrate rescinding his order. The Court declined to deal with the question of jurisdiction, and gave liberty to apply to Bateson J. further as to custody. The magistrate, after inquiries as to the way in which the child was being cared for, declined to vary his order, and on the matter being further argued before Bateson J. (1) he allowed the magistrate's order to stand. He was still of the same opinion as to jurisdiction, but was convinced that the order was right.

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(1) (1929) 45 Times L. R. 641.

(2) [1929] P. 157, 159.

(3) [1929] P. 245.

Either the wife or the husband may renew the application from time to time. The welfare of the child is the paramount consideration, and circumstances may change even in a very short time to justify a fresh application.

The matter was not res judicata, for the merits were never gone into till April 11, 1932. The decision of August 24, 1931, was on a preliminary objection only.

M. D. Van Oss in support of the rule. Once the Divorce Court is seised of a matter, the jurisdiction of the inferior court is ousted. Sect. 7, sub-s. 3, of the Guardianship of Infants Act, 1925, must be read in conjunction with s. 193, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, and r. 34 of the Matrimonial Causes Rules, 1924, which seem to contemplate that this jurisdiction should be exercised by the Divorce Court in cases where the matrimonial relations of the parties are before that Court. In *Vigon* v. *Vigon and Kuttner* (2) the magistrate's order was made before the Divorce Court became seised of the matter at all. Bateson J. (who was not overruled on the question of jurisdiction) held that that order could not stand in the presence of the superior jurisdiction, and it was merely a matter of courtesy to the magistrate to give him an opportunity to reconsider his order. In the result, it is true, Bateson J. was convinced that the magistrate had made the right order, and he exercised his jurisdiction by allowing it to stand.

To hold that there is a concurrent jurisdiction would lead to great inconvenience, and the observations of Bucknill J. in *Craxton* v. *Craxton* (3) support the view that the jurisdiction of the Divorce Court is exclusive.

(1) 45 Times L. R. 641.

(2) [1929] P. 157, 245; 45 Times L. R. 641.

(3) (1907) 71 J. P. 399, 400.

As to res judicata the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), contains provisions as to alteration and discharge of orders similar to those in s. 5 of the Guardianship of Infants Act, 1886, and there are decisions under that Act that the alteration must be made for good ground. Facts may come into existence which make the order wrong: therefore Parliament has provided that the Court is not to be permanently bound by its own order. But here there was no order before April 11, 1932, which the Court could alter on that date. No evidence of altered circumstances was before it. It is not open to a Court to reverse its own decision. It was open to the wife to appeal, if the decision in August was "a refusal of an order," or to go to the Divorce Court, if the decision was to be taken as being that the matter would more conveniently be dealt with by the High Court. It may well be that a respondent found guilty of adultery would not apply very confidently to the Divorce Court for custody, but she had de facto custody of the child, and there was no evidence of neglect.

On the question of res judicata see *In re May* (1); *Williams* v. *Davies* (2); *In re Graydon. Ex parte Official Receiver* (3); *Stokes* v. *Stokes*. (4)

LORD HEWART C.J. This is a rule nisi for a writ of certiorari directed to the justices of Middlesex to remove into this Court a certain order made under the hand and seal of one of them on April 11, 1932, whereby the legal custody of one Alick Geoffrey Arthur Bond, an infant, was committed to his mother, Hettie Maud Bond, and whereby William Frederick Bond, the father of the infant, was ordered to pay to the said Hettie Maud Bond five shillings weekly for the maintenance of the said infant while under the age of sixteen years. The grounds on which the rule was asked for and granted were twofold: (1.) that the jurisdiction of the justices was exhausted or excluded by a previous order made by the Uxbridge justices on August 24, 1931, and that the matter

(1) (1885) 28 Ch. D. 516, 518.

(2) (1883) 11 Q. B. D. 74.

(3) [1896] 1 Q. B. 417.

(4) [1911] P. 195.

was res judicata by reason of that order; (2.) that a decree for the dissolution of the marriage of the parties having been made absolute by the Divorce Division of the High Court on May 18, 1931, the jurisdiction of the justices to deal with matters affecting the custody or maintenance of children of the said marriage was excluded.

It may be convenient very shortly to repeat the material dates. The parties were married on April 16, 1919, and the child Alick Geoffrey Arthur Bond was born on July 3, 1923. On April 25, 1930, the husband filed a petition for the dissolution of the marriage. To that petition Mrs. Bond appeared, but it was not defended, and on November 3, 1930, a decree nisi was pronounced. On May 4, 1931, the wife made her first application to the justices about this child, when the justices ruled that as the matter was still before the Divorce Court they could not hear the application. On May 18, 1931, the decree was made absolute. On August 24, 1931, Mrs. Bond made a second application to the justices, when the question was raised as to the jurisdiction of the High Court, and the Bench ruled that the application ought to be made to the Divorce Division. On April 11, 1932, the wife made another application to the justices, who then made the order which it is now sought to quash.

In my opinion, this rule ought to be made absolute, and for my part I should be prepared to base that decision on the second ground—that the matter was in the hands of the Divorce Division of this Court. That view is supported by the judgment of Bateson J. in *Vigon* v. *Vigon and Kuttner* (1), and the observations of Bucknill J. in *Craxton* v. *Craxton*. (2)

Something has been said about hardship, but there is no real hardship, because by r. 34 of the Matrimonial Causes Rules a respondent, after entering appearance, may be heard "in respect of any question as to costs and a respondent who is husband or wife of the petitioner may be heard also as to custody of or access to children." More than that, it is now provided by s. 193, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925: "In any proceedings for divorce . . . . the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court." This matter has been for some time past in the hands of the Divorce Court, and I think that the jurisdiction of that Court is an overriding jurisdiction.

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(1) [1929] P. 157; 45 Times L. R. 641.

(2) 71 J. P. 399, 400.

I do not propose to deal at length with the question of res judicata, which indeed is unnecessary if my view of the first point is right. Having regard, however, to the provisions of s. 7 of the Guardianship of Infants Act, 1925, I think this matter was res judicata, whether the ruling of the justices on August 24, 1931, is to be regarded as a refusal to make an order, from which refusal the wife did not appeal, or as a decision that the matter was one which would more conveniently be dealt with in the High Court.

In my opinion this rule ought to be made absolute.

AVORY J. I agree, and I think that the rule ought to be made absolute on both grounds. On the ground that the matter was res judicata I think that the only fair inference from what took place on August 24 was that the justices decided that they had no jurisdiction on the ground that the decree had been made absolute, and that the matter was therefore entirely within the jurisdiction of the High Court, and in view of the failure to appeal from that refusal to make an order I think that the respondent is estopped from making any further application on the same grounds. There is no ground for saying that in so doing she was applying under s. 5 of the Guardianship of Infants Act, 1886, for the variation of an order, first, because there was no previous order—it was a refusal to make an order; and secondly, that those words apply only to cases where there is a change of circumstances to justify the application.

With regard to the other point, I need not repeat what has been said; I will only refer to the words of Bucknill J. in

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Avory J.

Craxton v. *Craxton* (1): "What right had the justices to give the wife the custody of the child when there is a suit pending in the Divorce Court?"

It is true that in this case a suit is not pending, but s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, puts the matter in the same position as if it were.

The inconvenience of holding that there is concurrent jurisdiction in the Divorce Court and in the justices is obvious, for if the justices may make an order as in this case, there is nothing to prevent the husband going to the Divorce Court the next day and asking, possibly successfully, for a contrary order. The question might see-saw between the two Courts, producing an absolute scandal. I agree that we ought to uphold what appears to have been the view of Bateson J. in *Vigon* v. *Vigon and Kuttner* (2), and make this rule absolute.

DU PARCQ J. On August 24, 1931, I think the justices decided that they had no jurisdiction. I am not entirely satisfied that the jurisdiction of the Divorce Court is exclusive; but, even if the justices were wrong in thinking that they had no jurisdiction, I think that the matter was res judicata, and on that ground I agree that the rule should be made absolute.

Rule absolute.

Solicitors showing cause: *Pierron & Morley.*
Solicitor in support of the rule: *W. A. L. Osborn.*

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(1) 71 J. P. 399, 400.

(2) [1929] P. 157; 45 Times L. R. 641.

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April 20, 21, 22, 27, 28, 29; *May* 2, 3, 13.

[1927. C. 2742.]

Chose in Action—Insurance (Marine)—Policy—Assignment—Reservation of Equitable Interest—Open Policy on Goods—Value of Goods—"Prime Cost"—Fraud—Concealment—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *ss.* 14, 16, 50, *sub-s.* 2—*Law of Property Act,* 1925 (15 & 16 *Geo.* 5, *c.* 20), *s.* 136, *sub-s.* 1.

By s. 50, sub-s. 2, of the Marine Insurance Act, 1906, " Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected."

By s. 136, sub-s. 1, of the Law of Property Act, 1925, " Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—(*a*) the legal right to such debt or thing in action; (*b*) all legal and other remedies for the same; and (*c*) the power to give a good discharge for the same without the concurrence of the assignor " . . . .

A firm of C., V. & Co., being owners or pledgees of certain cotton goods, which had been transferred or pledged to them by one member of the firm, insured them for 8000*l.* upon an open policy of marine insurance. The goods were lost at sea. The firm incurred a liability of 7000*l.* to one W., and in settlement of his claim it was agreed that they should assign the policy to him and that he should pay them a certain sum unconditionally and a further sum of 1000*l.* if, but only if, he should receive that amount or more from the insurers. W. then in his own name brought an action against the insurers to recover the value of the insured goods:—

Held on the facts by Scrutton L.J. that the plaintiff had failed to prove the value, if any, of the goods.

Held by Greer and Slesser L.JJ.:—

(1.) that the plaintiff had only acquired the policy subject to an equitable interest therein to the extent of 1000*l.* in the assignors: *Cotton* v. *Heyl* [1930] 1 Ch. 510 followed; and therefore (dubitante Scrutton L.J.) that he had not acquired " the beneficial interest," that is the whole beneficial interest, in the policy, within the meaning of s. 50, sub-s. 2, of the Marine Insurance Act, 1906;

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(2.) that an assignment of part of a debt or legal chose in action is merely an equitable assignment and is not effectual to transfer the legal right to the debt or "thing in action" under s. 136 of the Law of Property Act, 1925: *In re Steel Wing Co.* [1921] 1 Ch. 349 approved; *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* [1905] A. C. 454 distinguished; *semble Skipper & Tucker* v. *Holloway* [1910] 2 K. B. 630 overruled; and that therefore the plaintiff suing in his own name could not recover; by Slesser L.J. also on the additional ground that no express notice had been given to the insurers after execution of the assignment; Scrutton L.J. contra on this point, inclining to the view that, if there was an assignment valid in other respects, the pleadings gave sufficient notice of it pendente lite so as to bring the case within Order XVII., r. 3, of the Rules of the Supreme Court.

By s. 16, sub-s. 3, of the Marine Insurance Act, 1906: "In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole." Where the assured having purchased goods some time after their manufacture insured them in an open policy:—

Held, by Scrutton and Greer L.JJ., that the prime cost of the goods was their invoice or market value at or near the time of shipment or the time when the goods were first at risk.

APPEAL from the judgment of MacKinnon J. in an action tried before the learned judge without a jury. The action was brought upon a policy of marine insurance, the plaintiffs being two Egyptians named Constantinou & Valsamis, formerly trading in Egypt as Constantinou, Valsamis & Co., the assured, and one Leonard Lloyd Williams, their alleged assignee. Subsequently, in circumstances mentioned hereafter, the names of Constantinou & Valsamis were struck out and the action proceeded in the name of L. L. Williams as sole plaintiff.

In July, 1919, when the firm of Constantinou, Valsamis & Co. was being formed, Valsamis had promised to contribute 6000*l*. as his share of the capital of the partnership. He paid 2000*l*. To secure the remaining 4000*l*. he transferred or pledged to the firm twenty cases of cotton goods. Much of the evidence at the trial was directed to the value of these goods, but it was so conflicting and unreliable that no satisfactory conclusion could be drawn from it.

In or about July, 1921, Constantinou, Valsamis & Co., having become transferees or pledgees of the goods, insured them for 8000*l*. by an open and unvalued policy with the defendants, the Atlantic Assurance Co., describing the goods as shipped on board the *Parthian* (an American steamer owned and commanded by Greeks), on a voyage from Alexandria to Liverpool.

There was also shipped on board the *Parthian* by Constantinou, Valsamis & Co., as agents for Williams, a cargo of 5000 gallons of rum which Williams had bought from the British Army of occupation in Egypt at 8 piastres per pint. Williams had handed to Constantinou, Valsamis & Co. a delivery order for the 5000 gallons, with instructions to obtain possession of that amount; but they actually obtained from the British authorities about four times that amount and, without the knowledge of Williams, they shipped the larger amount on board the *Parthian* and insured it at the price they expected to realize on the sale of it in Liverpool or elsewhere.

On July 24, 1921, the *Parthian* and the cargo in question were lost off Oran, Algeria.

In respect of their unauthorized dealings with the cargo of rum Constantinou, Valsamis & Co. were sued by Williams in the Egyptian Courts, and judgment was given for Williams for 7000*l.* Negotiations then took place for the settlement of this claim. On April 26, 1927, they assigned to him half of their claim against the defendants on the policy of insurance in question. On July 23, 1927, they issued the writ in the present action, but did not serve it. In the course of correspondence the solicitors for the defendants informed the plaintiffs' solicitors that the plaintiffs' claim would not be considered so long as Constantinou, Valsamis & Co. were parties to it, but that if Williams got an assignment of the remaining half of the claim on the policy they would be prepared to offer him 500*l.* On October 11, 1927, the solicitors for Williams served the writ which had been issued. On November 7, 1927, the firm of Constantinou, Valsamis & Co. being in liquidation, Constantinou as liquidator offered to settle accounts between Williams and the firm by assigning to him the benefit of all claims and all money which might become due under the policy in question and other policies, and Williams agreed to make a present payment of 400*l.*, a payment of 600*l.* in three months, and, in the words of the agreement, "from the first money received from the Atlantic Assurance Co., Ld., in respect of the insurance claim for manufactured textile goods lost per S.S. *Parthian* off Oran, Algeria, in July, 1921, an amount up to but not exceeding 1000*l.*, this amount to become due and payable only if and when I receive the same from the said insurance claim. Should I only receive a lesser amount than 1000*l.*, then my liability under this undertaking is limited to the amount I receive. This being the final payment in respect of the assignment to myself of the whole remaining interest of the said firm of Constantinou, Valsamis & Co. in the three marine insurance claims set forth in the assignment to myself dated November 18, 1927." The assignment was not actually executed until November 18.

On November 23 Williams' solicitors amended the writ by striking out the names of Constantinou, Valsamis & Co. as plaintiffs, and the action proceeded in that form.

The defendants contended (1.) that the plaintiff had failed to prove that the goods the subject of the insurance had any ascertainable value; (2.) that they had been insured for a sum largely in excess of their real value; (3.) that the proper inference to be drawn from the facts was that the *Parthian* had been scuttled and that the over-insurance of the goods was part of a scheme to defraud the defendants; (4.) that at any rate the policy was void by reason of the non-disclosure of the real value of the goods, and (5.) that the plaintiff was not entitled to sue on the policy, inasmuch as (*a*) the assignment of November 18, 1927, did not pass "the beneficial interest," that is to say the whole beneficial interest, in the policy within the meaning of s. 50, sub-s. 2, of the Marine Insurance Act, 1906 (1), and (*b*) the plaintiff was not the assignee of the whole legal chose in action created by the policy within the meaning of s. 25, sub-s. 6, of the Judicature Act, 1873 (36 & 37 Vict. c. 66), now s. 136 of the Law of Property Act, 1925. (1)

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(1) See headnote.

MacKinnon J. held that Constantinou, as liquidator of the firm of Constantinou, Valsamis & Co., could only assign the interest of the firm as pledgees of the goods for a debt of 4000*l.*, and that, as in his view the goods were worth between 5000*l.* and 7000*l.*, he gave judgment for the plaintiff for 4000*l.*

The defendants appealed. There was a cross-appeal by the plaintiff, who claimed to be entitled to recover on the footing that he was assignee of the whole interest in the goods, and therefore of the whole interest in the policy as well.

Porter K.C. and *David Davies* for the appellants. The effect of the agreement of November 7, 1927, and the assignment of November 18 made in pursuance thereof was that the respondent became entitled to the policy of insurance subject to an equitable assignment or charge to the amount of 1000*l.* in favour of the firm of Constantinou, Valsamis & Co.: *In re Steel Wing Co.* (1); *Cotton* v. *Heyl.* (2) Therefore the respondent was never entitled to the whole interest in the policy or its proceeds. Indeed MacKinnon J. has held that Constantinou, Valsamis & Co. themselves were never fully entitled, but only partially and as pledgees of Valsamis, who was the original owner of the goods and pledgor of them to the firm.

The questions then arise (1.) whether a so-called assignment of less than the whole beneficial interest in a chose in action is valid by virtue of s. 136 of the Law of Property Act, 1925 (3), which was a re-enactment of s. 25, sub-s. 6, of the Judicature Act, 1873; and, if such an assignment is in general valid, (2.) whether an assignment of less than the whole beneficial interest in a policy of insurance is valid by virtue of s. 16 of the Marine Insurance Act, 1906.

With regard to the first question, in *Skipper & Tucker* v. *Holloway* (4) Darling J. decided that such an assignment was valid. That case went to the Court of Appeal, but there it was held that the point did not arise, inasmuch as the debt, part of which was alleged to have been assigned,

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(1) [1921] 1 Ch. 349.

(2) [1930] 1 Ch. 510.

(3) See headnote.

(4) [1910] 2 K. B. 630.

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never came into existence. In *Forster* v. *Baker* (1), where an attempt was made to assign part of a judgment debt, Bray J. dissented from the view of Darling J. and held that the attempt must fail. The judgment of Bray J. was affirmed in the Court of Appeal. (2) It was held that a judgment debt could not be assigned in part because two judgments cannot be issued on one judgment debt. The same reasoning would apply to an assignment of part of a simple contract debt or chose in action, for there cannot be two judgments upon one cause of action; and if a debt could be apportioned among several assignees, there could be as many judgments in respect of that debt as there were assignments. If part of a chose in action cannot be validly assigned under s. 136 of the Law of Property Act, 1925, the assignee is merely an equitable assignee and cannot sue in his own name but must join his assignor in the action: *Durham Brothers* v. *Robertson* (3); *In re Steel Wing Co.* (4) It is true that in *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (5) equitable assignees were allowed to bring an action in their own names without joining their assignors as parties; but that is explained in the judgment of Lord Macnaghten. (6) The defendants did not insist on the joinder. The defendants in the present case insist that the action is not maintainable unless the assignors are joined. An assignment of a chose in action cannot be called absolute if it does not purport to pass the whole interest: *Hughes* v. *Pump House Hotel Co.* (7)

To the second question the same reasoning applies. The right of an assured under a policy of insurance is a "thing in action" within the meaning of s. 136 of the Law of Property Act, 1925, and unless there are special words in s. 50, sub-s. 2, of the Marine Insurance Act, 1906, to the contrary effect, an assignment of a policy of insurance must follow the law of assignments of other choses in action. That section speaks of a marine policy being assigned "so as to pass the beneficial interest in such policy"; there are no such words as "or any part or share thereof," and it must be taken that "the beneficial interest" means the whole beneficial interest, that an assignment of anything less than the whole is merely an equitable and not a legal assignment, and the equitable assignee can only assert his legal right by making his assignor a party to the action.

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(1) [1910] 2 K. B. 636.
(2) Ibid. 641.
(3) [1898] 1 Q. B. 765.
(4) [1921] 1 Ch. 349.
(5) [1905] A. C. 454.
(6) [1905] A. C. 462.
(7) [1902] 2 K. B. 190.

[The arguments of counsel upon the value of the goods insured and the alleged fraud of Constantinou, Valsamis & Co. and their non-disclosure to the appellants of the true value of the goods, are sufficiently dealt with in the judgments.]

James Dickinson K.C. and *John Whyatt* for the respondent. The real effect of the transaction in July, 1919, between Valsamis and the firm of Constantinou, Valsamis & Co. is that the firm became not pledgees merely but absolute transferees of the goods, in return for which Valsamis was to be credited with 4000*l.* as the balance of his share in the capital of the partnership. The firm thus became owners of the whole interest, legal and equitable, in the goods, and consequently in the policy of insurance, the subject of this action. But even if they are to be taken as having become mere pledgees of the goods, still by s. 14, sub-s. 2, of the Marine Insurance Act, 1906, a mortgagee, consignee or other person having an interest in the subject matter insured may insure on behalf and for the benefit of other persons interested as well as for his own benefit; but it has never been suggested that in so doing he is anything less than the legal owner of the policy.

Then with regard to the settlement in November, 1927, in which Constantinou as liquidator of the firm assigned the policy among others to the respondent on the terms that he should pay him 1000*l.* out of the proceeds of the policy; if—which is not admitted—this constituted Constantinou an equitable assignee of 1000*l.*, so that the whole interest in the policy was never assigned to the appellant, then the question arises whether there can be an absolute assignment of part of

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a chose in action by virtue of s. 136, sub-s. 1, of the Law of Property Act, 1925. It is submitted that there can be. The sub-section is a re-enactment, in slightly different language, of s. 25, sub-s. 1, of the Judicature Act, 1873. One of the objects of that Act was to advance certain equitable interests to the full status of legal rights, and one of these interests was that of an equitable assignee. There might be, and often was, an equitable assignee of part of a fund or part of a debt. Why should not such an assignee participate in the benefit of the Act as well as the assignee of the whole fund or debt? It is said that there ought not to be two judgments in respect of the same debt; but no such objection was ever raised to making or granting of two decrees or two injunctions to enforce assignments of two parts of a debt. It is merely a technical objection to contend that there cannot be two judgments, and an objection which, it is submitted, it was the very object of the Judicature Act, 1873, to remove and abolish. Moreover when all has been said that can be urged against *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (1) it remains a case in which an equitable assignee was permitted to sue in his own name in a Court of law, which could never have happened before August 5, 1873.

Porter K.C. in reply.

Cur. adv. vult.

May 15. The following written judgments were delivered:—

SCRUTTON L.J. MacKinnon J. begins his judgment by saying that this case is the most unsatisfactory case he ever had to deal with, the evidence as presented on both sides being hopelessly unsatisfactory. I entirely agree with him. The Court in 1932 is asked to deal with a loss under a marine policy which occurred on July 24, 1921. Two material witnesses have died. The writ in the action was issued on July 23, 1927, one day before the Statute of Limitations would have destroyed the claim. The writ was originally issued in the name of Constantinou & Valsamis, formerly trading as the firm of Constantinou, Valsamis & Co., and

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(1) [1905] A. C. 454.

Leonard Lloyd Williams. On November 23, 1927, the first two plaintiffs were struck out and Williams remained as sole plaintiff. His interest being derived from the first two plaintiffs, he was exposed to all the defences available against them. They had insured through the Alexandria Agency of the defendant Company by an open and unvalued policy certain cotton goods on a voyage from Alexandria to Liverpool to the extent of 8000*l.*, but with no agreement as to value. It was not in evidence who, on behalf of the insurers or assured respectively, effected the policy, or what was disclosed or not disclosed when the policy was effected, or how the very unusual device of an open instead of a valued policy was adopted. The appellant, Mr. Williams, against whom it is right to say no suggestion of fraud or bad faith was or could be made, came into the transaction after loss, because he had established a claim against Constantinou & Valsamis in the Egyptian Courts for over 7000*l.* in respect of some improper dealings of theirs as his agents with some rum of his, and in settlement of the claim he took over their claim under the insurance policy on terms to be considered hereafter.

The cotton goods insured, the subject of the claim, were said to be shipped on the S.S. *Parthian*, a steamer on the American Register, but owned and commanded by Greeks. She apparently started from Alexandria with insufficient bunkers. Her captain put into Oran to get some more coal, but had no money to pay for it. The steamer lay in the harbour at Oran for some days. During a Sunday night the captain alleged that a fire broke out in the engine-room, an event which the judicial experts at Oran reported to be "not impossible but little probable." To extinguish the fire the port authorities sank the vessel, and the cargo was extensively damaged by fire and water. The loss was very suspicious. It recalled certain events which occurred during the disastrous shipping slump of 1921, the period in which this Court found several Greek ships to have been intentionally scuttled or burnt with intent to defraud underwriters; and counsel for the underwriters asked us to find that there was here a loss not accidental, but by collusion between Greek shipowners and cargo owners, Constantinou & Valsamis having at least three shipments on the vessel, all heavily over-valued. But the underwriters had not the courage to plead this; no evidence was called about the ship, although there is reason to believe it was under-insured, and all the direct evidence as to the cargo owners was an answer to a question to Constantinou: "I put it to you that both you and Valsamis were aware that the goods shipped in the *Parthian* were not likely to reach their destination? (A.) This is not true." I decline to deal with the matter on the suspicion that there was an arranged loss.

Starting then with the position that an honest assured has, this being an open policy, to prove the amount of his loss, s. 16, sub-s. 3, of the Marine Insurance Act, 1906, provides the measure of his loss: "In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole." "Prime cost" would ordinarily mean the first cost of manufacturing and would, on the cardinal principle of insurance indemnity, refer to the state of the goods at or about the time of their first being at risk, the time of commencing the adventure. The underwriters would not pay on an open policy on goods for the loss of a profit or rise in the market price which was expected to be made or to occur in the future; nor would the assured recover for a loss which had already been made at the time of starting the adventure, because the market price had fallen heavily since the assured bought or manufactured the goods.

But the assured may not be the manufacturer, or he may have bought some time before the adventure commenced. What is to be the measure of value? There is practically no English authority on the point. Lord Mansfield in *Lewis* v. *Rucker* (1) uses the phrase "prime cost" (in an open policy) "or value in the policy," but the point was not involved in the case, which related to a valued policy. Arnould, § 365 (2), has the sentence: "The prime cost of goods is generally evidenced by the invoice price, but is not conclusively fixed by it . . . . As a practical rule, the prime cost as evidenced by the invoice price, is by far the most convenient standard." The United States have no statute, but that excellent writer, Mr. Phillips, who I may say has probably been taken as one of the most authoritative writers on marine insurance, puts the matter thus. Sect. 1226 says (1): "The amount of insurable interest in goods is their market value at the time and place of the commencement of the risk. The best, though not conclusive, criterion of this interest, is the cost of the goods to the assured. This is the most satisfactory proof of the value, in case they are purchased near the time when the risk commences." The first paragraph of s. 1229 says: "The amount of insurable interest is most frequently the invoice price. But stating a price in the invoice does not determine the amount of interest any further than as it is a proof of the actual cost." The test is put in the Supreme Court of New York in *Le Roy* v. *United Insurance Co.* (2) in this way: "The prime cost of the goods might not, in many cases, be a just rule of computation, as where they were not purchased with a view to an immediate exportation, and had remained on hand for a considerable length of time. But in matters of commerce, the plainest and simplest rules are always the best. And I should incline to think that, generally speaking, the prime cost would be the best rule by which to test the value of the subject. The prime cost is commonly the market price of the article. And as the shipment, in the usual course of business, is made soon after the purchase, the prime cost is, ordinarily, the real value of the subject."

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(1) (1761) 2 Burr. 1167, 1170.

(2) 11th ed. (1924) pp. 512, 513.

It has frequently been pointed out by great judges, and especially by Bowen L.J. in *Castellain* v. *Preston* (3): "When there is a contract of indemnity no more can be recovered by the assured than the amount of his loss." . . . . "In all these difficult problems I go back with confidence to the broad principle of indemnity. Apply that and an answer

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(1) 3rd ed. (1853), vol. 2, p. 39.

(2) (1811) 7 Johns. 343, 355.

(3) (1883) 11 Q. B. D. 380, 397, 401, 406.

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to the difficulty will always be found." . . . . "Apply the broad principle of indemnity, and you have the answer. The vendor cannot recover for greater loss than he suffers." Apply this to the present case. The assured has at the commencement of the risk goods of uncertain value. He desires to insure that value against marine risks. If he bought the goods a year before and the market has fallen heavily, he cannot insure against that loss; it has already happened. Nor can he recover on an open policy the loss he suffers by the possibility of the goods having a higher market value on arrival at the port of destination which he loses by the ship's not arriving. What he has lost is the value when the adventure starts. Put the case of the insurance of a picture in an open policy which forty years ago when the painter was fashionable cost 4000*l.*, but at the time of shipment, when the painter is out of date, would only sell for 400*l.* The assured could not say: "The prime cost was 4000*l.*" As Phillips says: "The purchase price must be near the time when the adventure commences." Similarly, if Lawrence's "Red Boy," for which 95,000*l.* has been refused, were insured on an open policy, the underwriters could not say: "The prime cost when Lawrence painted it a hundred years ago was a few hundred pounds; that is its prime cost and the only amount recoverable." I approach the case, therefore, from the point of view of underwriters who are concerned to determine the cost to the assured, or the invoice or market value at or near the time of the shipment.

Constantinou, Valsamis & Co.'s connection with the goods is said to be that they held them as security for a debt owed to the firm by Valsamis, one of the partners, in that he had promised when the firm was formed in July, 1919, to put 6000*l.* into the firm as capital, but had only paid 2000*l.*, and consequently owed the firm 4000*l.*, for which sum he had pledged the goods as security. There are no documents or books to prove this transaction, which rests upon the oral evidence of Constantinou. Valsamis refused to give evidence for Williams, unless the latter promised him 25 per cent. of the amount recovered. [The Lord Justice proceeded to sift thoroughly the evidence relating to the value of the goods at the time of shipment, exposing the inconsistencies in the statement of each witness with his testimony and that of the others, and stated his conclusion thus:—] I am unable to make any finding in view of the innumerable frauds and contradictions which the plaintiff, himself innocent, has to put forward to support his assignors' claim. If Constantinou and Valsamis were plaintiffs, I should unhesitatingly say they had not satisfied me of any amount of value. As it is, the first 1000*l.* recovered by Mr. Williams, if he should recover anything, will go to Constantinou, Valsamis & Co. I have very carefully considered the evidence, and the plaintiff has not satisfied me of any value that I can reasonably place on whatever goods were contained in the twenty cases described in the manifest as "twenty caisses manufacture," which I am satisfied were shipped in the *Parthian* by Constantinou, Valsamis & Co. I do not think MacKinnon J. was himself satisfied on that point.

This is enough to put an end to the case, the judgment being set aside with costs, but I deal shortly with some other matters argued. The underwriters said that if a value was proved for the goods, there must be a concealment, either with or without fraud, of a material fact—namely, that the real value of the goods was so much below the amount insured. They accordingly pleaded in paragraph 5 of the defence: "Alternatively, at the time of effecting the said insurance the said Constantinou, Valsamis & Co. fraudulently omitted to disclose or alternatively failed to disclose to the defendants a material fact which was then known to the said Constantinou, Valsamis & Co. and unknown to the defendants —namely, that the said goods were of far less value than the sum insured," but in the result they were in the very unusual position of not having called the underwriter to prove what he was or was not told when the insurance was effected in Alexandria by the agents of the defendants, Augustino & Co., through one Cohen. This question came before the Court in *Visscherrij Maatschappij Nieuwe Onderneming* v.

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Scottish Metropolitan Assurance Co. (1), the case of a Dutch trawler. Rowlatt J. found the trawler was scuttled, and this Court did not disturb his decision. The underwriters, while pleading concealment, gave no evidence as to what they were or were not told. Lord Sterndale M.R. said: "The underwriters gave no evidence at all as to what facts about the ship were communicated to them. They gave no evidence as to whether such an over-valuation as this would have been a material fact. They left the whole thing absolutely bare. Without saying the judge was wrong, I will only say I think the evidence was nothing like as complete as it ought to have been; and therefore I should have doubts about that if I had to give judgment on it. But I think my judgment on the other point is sufficient to dispose of the case." But I do wish to say I have the gravest doubt whether the judge was right on the question of concealment. The underwriters have not taken the course, which in my view should always be pursued, of going into the box and saying what they knew and what was the material fact which they did not know. In my view an underwriter pleading concealment must come and say what he was or was not told. He may not remember directly, but may be able to say, as he said in *Greenhill* v. *Federal Insurance Co.* (2), that he cannot have been told this material fact; that if he had known it he would never have dreamed of writing this policy at the ordinary rate of premium. Now in the present case the policy was underwritten by a foreign agent, who would get commission on the premium by underwriting the policy and who might think that, as the policy was an open policy, and therefore the assured must prove his actual loss, it would not matter how much was insured; the larger the sum the larger his commission. We do not know what happened; the underwriter may have been shown the Levi invoices and made his own inquiries about value. Anyhow the underwriter, Cohen or another, was not called. The London representatives of the defendants had intended to call him, but for reasons of which we have no evidence he was not found or called. An application was then made to reopen the commission; it was refused by MacKinnon J. and the refusal was not appealed against. It is said that that very experienced judge in marine insurance matters said it was not necessary to call him. I can hardly believe this, but if he said so I cannot agree with him. In my view in a plea of concealment the underwriter must be called to say what he was told, unless all communications are in writing. The defendants then got an affidavit from Cohen and applied at the trial to read it. The application was refused, and in view of Order XXXVII., r. 1, rightly refused, as it was obvious that there would be a bona fide desire to cross-examine on the affidavit. If therefore the case had turned only on concealment, I should have refused to decide against the plaintiffs on it, as I think the matter of such general importance that calling the underwriter should be strictly required. As it is, the evidently gross over-valuation supports the insuperable difficulty I find in putting any value on the goods.

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(1) (1922) 10 Ll. L. Rep. 579, 583.

(2) [1927] 1 K. B. 65, 78.

A further suggestion of fraud was made in connection with a firm named Metaxa, who in 1922, in company with Valsamis, put forward to the solicitors for the underwriters some correspondence between Metaxa and Valsamis in 1921 before the shipment, purporting to show that the shippers had reason to believe they could sell the insured goods in England. The underwriters called some evidence to suggest that this correspondence was forged. I see no reason to accept this suggestion, but I see no particular reason to attach any weight to this correspondence. What is relevant is, as already stated, that the invoice Valsamis then produced does not agree with the Levi invoices in values or quantities.

There remain some complicated points about the title of Williams to sue. The insurance was apparently effected by Constantinou, Valsamis & Co. to cover both the firm's interest as pledgees and Valsamis' interest as pledgor. Williams was engaged in litigation with Constantinou, Valsamis & Co. over the rum already referred to, and had an Egyptian judgment against them for 7000*l.* Apparently in part settlement of this claim they, on April 26, 1927, assigned to Williams 50 per cent. of the claim in the present action, and gave notice to the Atlantic Assurance Co., the appellants. This assignment is not produced, unless the document of October 11, 1927, is said to be it. This document does not refer to the letter of April 26. On July 23, 1927, the present writ was issued in the names of Constantinou, Valsamis and Williams, but not served. On September 9 and 30, 1927, the solicitors for the underwriters informed the solicitors for the plaintiffs that the underwriters would not discuss the claim so long as Constantinou, Valsamis & Co. had anything to do with it, but if Williams got an assignment of the remaining 50 per cent. of the claim they would offer him without prejudice an ex gratia payment of 500*l.*, but he must take this or fight. Thereupon Williams' solicitors served on October 11 the writ they had issued on July 23, 1927, and amended it on November 23, 1927, by striking out Constantinou & Valsamis as plaintiffs. Meanwhile on November 7 Williams purported to accept an offer from Constantinou, as liquidator of the firm, to assign the remaining interest of the firm in three policies, including the one sued on here, for 2000*l.*, and enclosed a letter for Constantinou to sign, terms of payment 400*l.* down, 600*l.* in three months, and 1000*l.* when, and only when, Williams received payment to that extent from the insurance company. This was accepted on November 10. Notice was given to the insurance company on November 14, of an assignment of the remaining 50 per cent. of the claim. In fact the assignment was not executed until November 18, and acknowledged on December 6. The notice alleged that Williams was now the only person interested in the action. In view of the fact that Constantinou, Valsamis & Co. were interested in the recovery to the extent of 1000*l.*, this was hardly accurate. The decision of Luxmoore J. in *Cotton* v. *Heyl* (1) appears to show that they had an equitable assignment of the proceeds of the action up to 1000*l.* The 400*l.* and the 600*l.* were paid, though not punctually.

(1) [1930] 1 Ch. 510.

MacKinnon J. has held that the liquidator of the firm can only assign the interest of the firm as pledgees, which is only 4000*l.*, and not the interest of the pledgor, Valsamis, to the remaining 4000*l.* claimed, and that, as he thinks the value of the goods at the time of shipment was more than 4000*l.*, although he cannot find what it was between 5000*l.* and 7000*l.*, the judgment must be limited to 4000*l.* The plaintiff cross-appeals against this, while the defendants appeal against any judgment for any amount.

On this part of the case the underwriters took various technical defences, which I think resolved themselves into the question whether the original assured must be parties to the action. They had been parties, and, as such, had made affidavits of ship's papers. I do not like the action of the underwriters in taking these points, as they induced Williams and his advisers to get rid of the original assignors by saying that they would not make any proposal to him so long as Constantinou, Valsamis & Co. were parties, and when he struck those parties out, but was not able to accept the proposal made to him without prejudice, the underwriters did not say: "Now mind, if you go on you must see you have the necessary parties to the action." It is unnecessary for me to decide these points, as I am against the plaintiff on the merits of the case, but I think it is fair that I should state provisionally, but not finally, the opinion I am inclined to form. Under s. 14 of the Marine Insurance Act, 1906, the mortgagee or pledgee may insure the whole value of the subject matter insured, being under an obligation to the mortgagor to account to him for any surplus over the mortgage debt. MacKinnon J. thinks that the mortgagee cannot assign more than his actual pecuniary interest in the policy; this is why he limits the claim to 4000*l.* I am inclined to doubt the correctness of this and to think that the mortgagee can assign the whole interest he has—namely, the right to recover the whole amount, with an obligation to account for part of it to the mortgagor, which does not affect the underwriters. I think it is true that on this assignment the assignor retains against the assignee an equitable interest in the first

1000*l*. recovered, but I am disposed to think this is only as between assignor and assignee, and does not afford the underwriters any defence. I think the assignment pendente lite was valid under Order XVII., r. 3, and the pleadings were sufficient notice. But, as I have said, I do not think it necessary to decide these technical points finally. I decide against the plaintiff on the merits. I am sorry for him, as I think he is free from blame, except for getting into bad company, but he must suffer for the faults of his assignors.

The appeal must be allowed with costs, and the judgment below set aside and judgment entered for the defendants with costs. The cross-appeal must be dismissed with costs.

GREER L.J. I entirely sympathize with the great difficulty experienced by the learned trial judge in his effort to ascertain and find the facts relevant to any decision of this case. The evidence obtained by the examination of witnesses in Palestine is most unsatisfactory, and was insufficiently tested by cross-examination. The appellants contended that they were entitled to succeed for all or several or one of five distinct reasons: (1.) They say in the first place the plaintiff failed in limine by not giving any evidence that should have satisfied the Court that the goods had any ascertainable value; (2.) They contend that the judge should have inferred from the facts proved that these goods were shipped and insured as part of a fraudulent conspiracy on the part of those in charge of the ship that the ship should be scuttled and the shippers should thereby realize a value by over-insurance that they were totally unable to realize by sale; (3.) They say that the goods were over-insured to an amount which justifies the inference of fraudulent insurance; (4.) They say that even if the over-insurance falls short of that which would afford a reasonable inference of fraud, it was such as to justify the inference of concealment of material facts; and (5.) they say that the plaintiff's only title was as equitable assignee who could not succeed after the deletion of the names of his assignors as plaintiffs in the action.

It seems to me more convenient to deal first of all with the last point raised, as it amounts to a preliminary objection to the plaintiff's right to sue on the policy. It is said that he cannot sue under the Marine Insurance Act, 1906, s. 50, sub-s. 2, because the assignment did not pass the beneficial interest in the policy, that is to say, the whole beneficial interest in the policy, so as to entitle the plaintiff Williams to sue thereon in his own name, and it is said in the second place that, inasmuch as there was no written notice of assignment within the terms of the Judicature Act, 1873, s. 25, sub-s. 6, now the Law of Property Act, 1925, s. 136, he cannot sue in his own name as legal owner. This branch of the argument involved two distinct contentions. It was contended in the first place that the firm never had the whole beneficial interest in the policy, because the goods covered by the policy were goods of which they were only mortgagees for the amount of 4000*l.*, the capital which Valsamis had agreed to provide for the firm of Constantinou, Valsamis & Co. In my judgment this argument ought not to succeed. I deal with this point on the assumption that there is no reason to disbelieve what the witness Constantinou says in his evidence as to the arrangements he made with Valsamis with reference to the goods. According to his evidence all the goods which were shipped on the *Parthian* and insured by the policy which was the subject matter of the action, were transferred by Valsamis to the firm of Constantinou, Valsamis & Co. on the terms that when sold the proceeds should be held to the amount of 4000*l.* as Valsamis' contribution to the capital of the firm, and the balance should be held to his credit. I think the meaning of this is that the goods and the whole of their proceeds of sale were to belong to the partnership, but that the partnership would have to account to Valsamis by putting 4000*l.* to the credit of his capital account, and crediting him with the balance, if any, as the amount due from the partnership to him. The policy was taken out on behalf of the firm, and it was not a policy in which Valsamis had any interest except as a member of the firm. I think this contention fails.

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But the appellants also contended that, inasmuch as in assigning the policy to Williams, Constantinou, representing the firm, stipulated as part of the arrangement that the first 1000*l.* received under the policy should be paid to him, the beneficial interest in the policy was partly in Constantinou as representing the firm and partly in Williams, and that even if the interest of Constantinou in the first 1000*l.* had been created by a separate transaction, it would have amounted to an equitable assignment of an interest in the policy. It seems to me this is established by the decision of Lawrence L.J., then P. O. Lawrence J., in *In re Steel Wing Co.* (1), and the decision of Luxmoore J. in *Cotton* v. *Heyl.* (2) I think that these decisions correctly lay down the law, and that it is impossible to say that the plaintiff Williams obtained the beneficial interest in the policy which would be necessary to enable him to sue in his own name under s. 50 of the Marine Insurance Act. It is not material whether the beneficial interest in part of the policy moneys arose after an assignment by the beneficial owner of the whole interest, or, as in the present case, by a retention of part of the beneficial interest by the assignor at the time of the assignment.

The question remains whether the assignee of part of a debt is a legal assignee who can sue in his own name, or whether, if he be an equitable assignee, he can sue without having his assignor made a party to the action. It seems to me quite clear, notwithstanding the decision of Lord Coleridge in *Brice* v. *Bannister* (3), that the assignee of part of a debt is merely an equitable assignee, and at any rate, unless the equitable assignment be accompanied by a power to give a discharge, it is impossible for the assignee to succeed unless he sues in the name of the assignor: see the observations of the Court of Appeal in *Durham Brothers* v. *Robertson* (4) and the decision already cited in *In re Steel Wing Co.* (1)

In *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (5), judgment was given in favour of equitable assignees who

(1) [1921] 1 Ch. 349.
(2) [1930] 1 Ch. 510.
(3) (1878) 3 Q. B. D. 569.
(4) [1898] 1 Q. B. 765.
(5) [1905] A. C. 454.

sued without their assignors having been made parties to the proceedings. The assignment was one like that in *Brice* v. *Bannister* (1), giving the power to give a perfectly good receipt. Lord Macnaghten in his speech says (2): "Strictly speaking, Kramrisch & Co."—the assignors—"or their trustee in bankruptcy, should have been brought before the Court. But no action is now dismissed for want of parties, and the trustee in bankruptcy had really no interest in the matter. At your Lordships' bar the Dunlops disclaimed any wish to have him present, and in both Courts below they claimed to retain for their own use any balance that might remain after satisfying Brandts." In the present case the appellants seriously object to the absence of Constantinou and Valsamis as co-plaintiffs with Williams. The objection is one which they are entitled to take, and in my judgment it is fatal to the action as at present constituted. We have not been asked to amend the proceedings by rejoining these two parties who were struck out. I do not think the fact that the defendants refused to consider any question of compromise as long as the firm were parties with whom they had to deal, but were willing to offer 500*l.* to Williams if he were the sole person with whom they were concerned, estops them from saying that as he did not accept their offer he was not entitled to proceed with his action in the absence of the two persons who were in law necessary parties, and who, if the action had proceeded with their names as plaintiffs, might have been subjected to the duty of answering inconvenient interrogatories. In my judgment the action should fail on this ground, but, inasmuch as the other grounds have been argued, I think it right to express my view on them.

I think the learned judge was right in refusing to infer that there was in this case a fraudulent conspiracy between the shippers, or one of them, and somebody on board the ship, that the ship should be scuttled. If the defendants based their defence on an accusation of that kind, they ought to have stated it plainly in their pleading. They not only

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(1) 3 Q. B. D. 569.

(2) [1905] A. C. 462.

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did not so state it, but they gave no evidence which would, in my view, have justified any such finding by the learned judge.

As regards the question of fraudulent over-valuation, or material concealment, it seems to me that the case made by the plaintiff was deficient in two respects. No evidence was given as to what facts were communicated by Constantinou, or whoever acted for him, to the insurers, or the agent acting for them in Alexandria, and I do not think the inference ought to be drawn either (1.) that there was any concealment, or (2.) that if the facts had been stated in Alexandria to the Company's agents, those facts would have been regarded as of sufficient importance to have resulted in the refusal of the insurance. It is to be remembered that a good premium is a desirable thing from the point of view of insurers and commission agents, and over-valuation may not be regarded by them as of great importance in an unvalued policy, because they would know that whatever value has been put in the policy, the insurers, in the event of a loss, will not have to pay any more than the proved value, and that if there should be no loss the insurers would be able to profit by a higher premium than they would otherwise have obtained, and the agent by a higher commission. I have no doubt whatever that there was a very substantial over-valuation of the goods which were the subject matter of the policy sued upon.

In my opinion s. 16 of the Marine Insurance Act, 1906, is to be construed in the light of the consideration that the object of all insurance is indemnity: see especially per Lord Esher M.R. (then Brett L.J.) and Bowen L.J. in *Castellain* v *Preston*. (1) I think the words "prime cost" in that section mean the prime cost to the assured at or about the time of shipment, or at any rate at some time when the prime cost can be reasonably deemed to represent their value to their owner at the date of shipment. To hold that the prime cost at a period of boom long past must by statute be taken to be the value at a time when values had become diminished by 50 per cent. would have the effect of enabling the assured to recover under his right to indemnity for loss during the voyage a sum which would represent a loss incurred long before the voyage started.

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(1) 11 Q. B. D. 380, 386, 397.

I am disposed to think that the values as stated in the invoices should, in the absence of evidence justifying a finding of fraud, be taken to be the value at the time when Valsamis acquired the goods towards the end of 1919, or the early part of 1920; and I am also inclined to think that the evidence is sufficient to prove that the goods had by the time of shipment retained value to the extent of about 50 per cent. But having regard to the view already expressed that the action fails because of the disjoinder of Constantinou & Valsamis as co-plaintiffs, it is unnecessary for me to give any decision on the question whether judgment might otherwise have been given for 4000*l.*

I desire to make one or two further observations, which I have not written down. I have some difficulty in drawing any inference about the fraudulent under-valuation for the purposes of the Customs in Alexandria which enables me to come to any conclusion as to the real value of the goods in question in this case. It is an unfortunate fact that nearly all over the world, with business people who are not too scrupulous, it is regarded as permissible to cheat the Customs whenever the opportunity occurs; but in addition to that, there is another difficulty about this, and that is, that the valuation to the Customs is fraudulent only because we are satisfied that the goods had a much larger substantial value than the 250*l.* put down. It does not seem to me one can assume, or ought to assume, that the goods have no value at all, because we say they were under-valued when the shippers were dealing with the Customs. But be that as it may, as I have said, it is unnecessary for me to form a final conclusion as to whether the judge would otherwise have been right in entering judgment for 4000*l.*, because I think the absence of the two members of the firm as plaintiffs in the action is fatal to the success of the action.

I agree that the appeal should be allowed with costs, and the cross-appeal should be dismissed with costs.

SLESSER L.J. In this appeal objection is taken at the outset by the appellants to the title of Mr. Williams, the plaintiff, to sue as assignee in law of the beneficial interest in the marine policy.

No question is raised on the equitable title of Mr. Williams. Originally the assignors of the policy were joined to Mr. Williams as plaintiffs, but in November, 1927, they were struck out, and it is said that Mr. Williams can no longer rely on his equitable interest by reason of the fact that the legal owners are no longer parties to the action.

The history of the assignment reveals two matters, (*a*) as regards the immediate assignors to the plaintiff, a firm known as Constantinou, Valsamis & Co., Mr. Constantinou, as liquidator of the firm, on November 18, 1927, for consideration purported to assign to the plaintiff the benefit of all claims and all money which might become due under the policy, and by letter of the same date Mr. Constantinou requested the agents of Mr. Williams, the plaintiff, to hand over to him the assignment on certain terms, which terms were accepted by Mr. Williams on December 6. So far as is material to an ascertainment of the exact nature of the transaction, I quote from this letter of December 6 to the following effect: Mr. Williams agrees to pay to the liquidator "from the first money received from the Atlantic Insurance Company, Ld., in respect of the insurance claim for manufactured textile goods lost per S.S. *Parthian* off Oran, Algeria, in July, 1921, an amount up to but not exceeding 1000*l.*, this amount to become due and payable only if and when I receive same from the said insurance claim. Should I only receive a lesser amount than 1000*l.*, then my liability under this undertaking is limited to the amount I receive. This being the final payment in respect of the assignment to myself of the whole remaining interest of the said firm of Constantinou, Valsamis & Co. in the three marine insurance claims as set forth in the assignment to myself dated November 18, 1927." In my opinion, the real result of these transactions, apart from over-nice subtleties, was that the liquidator, who held the policy which had been taken out in the name of the firm, retained a beneficial interest in the policy to the extent of 1000*l.*, and that consequently at most Mr. Williams had a beneficial interest in part only of the policy.

By s. 50, sub-s. 2, of the Marine Insurance Act, 1906: "Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected." These latter words indicate that the person by or on behalf of whom the policy was effected has parted in the conditions contemplated by the section with the whole of his beneficial interest. At common law, the assignee could not sue in his own name on the policy, but an action could be brought by the assignor as trustee for the assignee: *Gibson* v. *Winter.* (1) The power of the assignee to sue in his own name was conferred by the Policies of Marine Assurance Act, 1868, s. 1, and amended by the Act of 1906, and it is incumbent upon an assignee who wishes so to sue and does not join the assignor to satisfy the section. For the reasons I have stated, Mr. Williams has failed to bring himself within the Act, for he is not, in my view, possessed of more than part of the beneficial interest in the policy, part of which is either still in the legal ownership of the liquidator on behalf of the assignors or at least is impressed with an equitable interest in their favour: see per P. O. Lawrence J. in *In re Steel Wing Co.* (2) and Luxmoore J. in *Cotton* v. *Heyl.* (3) In neither view has the beneficial interest passed within the meaning of the 1906 statute. The principle that the contract is one of indemnity implies that the beneficial interest in the policy cannot while it remains in force be severed from the interest assured: Arnould, 11th ed., s. 176.

A further ground to establish the title of Mr. Williams is sought in the Law of Property Act, 1925, s. 136, as applied by Order XVII., r. 3. There is no doubt that the requirements of s. 136 of the Law of Property Act, 1925, as such, have not been complied with, that is to say, no express notice in writing had been given to the appellants. The only written notice relied upon was given to them on November 14, 1927, but the assignment was not executed until November 18. Faced with this difficulty the plaintiff seeks to rely upon Order XVII., r. 3, which provides that in case of an assignment pendente lite the cause may be continued by the person to whom the title has devolved. Notwithstanding this rule, I am of opinion that the statutory requirements of express notice must be complied with, and that a tender of notice of the assignee as a party and an amended pleading is not in itself an express notice in writing within the meaning of s. 136; it is at most an indirect and adjectival notice. The statute amends the common law by giving the assignee a legal title and must be strictly complied with, though Order XVII., r. 3, operates to permit such express notice to be given pendente lite.

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(1) (1833) 5 B. & Ad. 96.
(2) [1921] 1 Ch. 349.
(3) [1930] 1 Ch. 510.

The second obstacle in the way of the plaintiff to establish his legal title to sue is as follows: I do not propose to review the evidence, but, in my opinion, the result of the tortuous transactions between Mr. Valsamis and his firm was that the firm never became more than pledgees of his goods to them to the extent of 4000*l*., his contribution owing to the capital of the firm. I think that the insured goods were bought by Valsamis himself, that the legal ownership remained in him, and that they were never transferred to the firm at all. The later invoices showing the goods in the possession of the firm clearly do not relate to any actual legal assignment of the goods or delivery of them from Valsamis to the firm. It follows that the interest of the firm is limited, in any event, to 4000*l*. as security, and as the declared interest was 8000*l*. I do not think that, in any event, they were in a position to assign more than 4000*l*., that is, 50 per cent. of the value, as mortgagees, for that was the full extent of their interest either in equity or in law. On this view it is immaterial whether Constantinou, Valsamis & Co. actually recover the

4000*l.* pledged or less. On any view of the value, the partnership were never interested as pledgees in more than one-half of the value of the goods whatever it was. At most they had only a moiety of the interest.

These conclusions operate to non-suit the plaintiff, but had I to consider the case on merits I should have arrived at the same result, that the plaintiff fails.

By s. 16, sub-s. 3, of the Marine Insurance Act, 1906, it is provided that: "In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole." As the policy here under consideration is an open policy, it becomes necessary for the plaintiff to prove the prime cost of the goods. This prime cost it is sought to prove by adducing as evidence certain invoice prices which are said to be the prices which the assignors of the policy paid for the goods. I have come to the conclusion that these invoices have no evidential value for the reasons stated by Scrutton L.J., which it is unnecessary for me to repeat. In these circumstances the only evidence of value which exists is that contained in the Customs Declaration of June 11, 1921, in which the goods are said to be worth 250*l.* [The Lord Justice then stated and weighed the evidence relating to and purporting to explain this declaration, and proceeded:] While I do not find it necessary to decide whether the Customs declaration was or was not a true declaration of value, I can find no evidence to support the claim of the plaintiff that the value was more than that declared to the Customs, and I take the 250*l.* as the highest value which the plaintiffs have proved. It seems to me, even assuming that there was corruption among Customs officials, extremely undesirable that the plaintiff should be allowed to set up his own assignor's fraud as a means to escape the declaration of value which the assignor made in accordance with the laws of the country from which the goods were exported, and I see no sufficient reason to make the assumption. The misrepresentation that the goods were worth 8000*l.*, when in fact they were worth, as

I find, at any rate not more than 250*l.*, is an over-valuation so gross that it is calculated to influence and must in fact have influenced the underwriter in taking the risk. This misrepresentation, unlike the cases of concealment and fraud, is apparent on the face of the documents, and, if I am wrong on the technical question of assignment, I hold that, under s. 20 of the 1906 Act, the underwriter was entitled to avoid the contract for an untrue material representation. That is to say, I find the value which was declared at 8000*l.* to have been in fact 250*l.* and no more.

I agree, however, with my brothers that the allegation of concealment and fraud must fail. The underwriters have not proved that they were led to act upon any misrepresentation. It is not proved that their agent was unacquainted with the fall in the value of cotton goods at the time of shipment, nor is it proved that he did not know the true circumstances of the history of the invoices and other transactions relied upon. He who avers concealment or fraud must prove it and that it induced the results complained of, and in the present case such latter proof is wholly lacking.

I hold that this appeal must succeed, because the plaintiff has no title to sue, or, alternatively, has so over-valued his goods as to entitle the defendants to avoid the contract.

Appeal allowed; cross-appeal dismissed.

Solicitors for appellants: *Parker, Garrett & Co.*
Solicitors for respondent: *Thomas Cooper & Co.*

W. H. G.

In re SMITH AND THE BRITANNIC ASSURANCE COMPANY, LIMITED'S ARBITRATION.

C. A.
1932
June 28, 29.

Insurance (*Life*)—*Industrial Life Insurance—Insurance of Child's Life—Statutory Limits of insurable Amounts—Endorsements on Policy limiting Insurances within statutory Limits—Proviso in Policy stating Effect of the Friendly Societies Act,* 1896 (59 *&* 60 *Vict. c.* 25), *s.* 62, *as amended—Legality—Industrial Assurance Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 8), *ss.* 5, 21, *sub-s.* 1—*Friendly Societies Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 11), *s.* 2, *sub-s.* 1.

On June 11, 1927, a policy of industrial assurance was issued on the life of a child under ten years of age assuring the sums stated in Schedule B to the policy. The table in Schedule B was made out on the basis of a premium of one penny per week, and insured sums payable on the death of the child from 10*s.* to 10*l.*, the statutory maximum provided by s. 62 of the Friendly Societies Act, 1896, as unamended. But the policy was adapted for use to the case of a weekly premium of 2*d.* by the device of altering the amount of premium as printed and putting two endorsements on the policy: "The premium in this case being twopence the amounts stated in Schedule B are increased in proportion subject to the conditions of the Friendly Societies Act."

"Schedule B. Re amount payable at death before age ten is subject to reduction in accordance with the terms of the Industrial Assurance Act, 1923, as stated in the second proviso on the face of the policy."

This proviso was: "Provided also that this policy is issued subject to the provisions of section 62 of the Friendly Societies Act, 1896, as amended by the Industrial Assurance Act, 1923, which provisions make it illegal for any industrial insurance company to insure or pay on the death of a child any sum of money which, added to the amount payable on the death of the child by any other company, society, branch or trade union exceeds 6*l.* if the child dies under three years of age, 10*l.* if it dies at or under six, and 15*l.* if it dies at or under ten."

By the Friendly Societies Act, 1924, a new section had been substituted for s. 62 of the Act of 1896 as amended by the Act of 1923, and the statement in the proviso erred in stating the effect of the new section (1.) by omitting after "any sum of money" the words "which exceeds or"; and (2.) by referring to the age limits in two cases as "at or under" instead of "under."

The mother of the child claimed to recover the premiums paid by her (1.) under s. 5 of the Industrial Assurance Act, 1923, on the ground that the policy was illegal, as under it a sum was assured exceeding the amounts specified in s. 2, sub-s. 1, of the Friendly Societies Act, 1924; and (2.) under s. 21 of the Act of 1923 on the ground that the policy did not set out a statement of the effect of s. 62 of the Act of 1896 as modified by s. 2, sub-s. 1, of the Act of 1924:—

Held (affirming Swift J.'s decision), (1.) that the amounts insured had been sufficiently limited by the two endorsements: *In re Hirst* *and Liverpool Victoria Friendly Society* [1930] 2 K. B. 209 applied. (2.) that the effect of the section substituted by s. 2, sub-s. 1, of the Act of 1924 for s. 62 of the Act of 1896 was sufficiently stated in the proviso in the policy.

APPEAL from a decision of Swift J. on an award stated in the form of a special Case by Sir George Stuart Robertson K.C., Industrial Assurance Commissioner, in pursuance of s. 7 (*b*) of the Arbitration Act, 1889, and/or of s. 32, sub-s. 1, of the Industrial Assurance Act, 1923, applying s. 68, sub-s. 7, of the Friendly Societies Act, 1896.

1. The matter was a dispute referred to the Commissioner in pursuance of s. 32, sub-s. 1, of the Industrial Assurance Act, 1923, by the above named Ellen Louise Smith as parent of Ronald C. Smith and the above named Britannic Assurance Co., Ld. (hereinafter called "the company"), which is an industrial assurance company within the meaning of the Industrial Assurance Act, 1923, and to which was transferred the business and undertaking of the British Legal Life Assurance Co., Ld., which before the transfer was an industrial assurance company within the meaning of the said Act.

2. The said British Legal Life Assurance Co., Ld., issued to the said Ellen Louise Smith a policy of industrial assurance dated June 11, 1927, on the life of the said Ronald C. Smith, a child under ten years of age, assuring the sums stated or referred to therein at a premium of 2*d.* per week. The said policy was issued after the commencement of the Industrial Assurance Act, 1923.

All the premiums which have been paid on the said policy have been paid by the said Ellen Louise Smith.

3. The said Ellen Louise Smith claimed from the company a sum equal to the premiums paid by her—

(*a*) Under s. 5 of the Industrial Assurance Act, 1923, on the ground that the said policy was illegal, inasmuch as under it a sum was assured exceeding the amounts specified in s. 2, sub-s. 1, of the Friendly Societies Act, 1924; or

(*b*) Under s. 21 of the Industrial Assurance Act, 1923, on the ground that the said policy did not comply with the provisions of that section, inasmuch as it did not set out a statement of the effect of s. 62 of the Friendly Societies Act, 1896, as amended by s. 2, sub-s. 1, of the Friendly Societies Act, 1924.

4. The said policy was issued on a printed form applicable only to an assurance on the life of a child under ten years of age at a weekly premium of one penny for the sums severally set out in Schedule B thereto ranging from 10*s.* to 10*l.*, the statutory maximum provided by s. 62 of the Friendly Societies Act, 1896, as unamended; but the said form was adapted for use in the case of a weekly premium of 2*d.* by the device of altering the amount of premium as printed and putting on two endorsements as set out in para. 6 hereof.

5. The said policy contained on its face the following proviso: "Provided also that this policy is issued subject to the provisions of section 62 of the Friendly Societies Act, 1896, as amended by the Industrial Assurance Act, 1923, which provisions make it illegal for any industrial assurance company to insure or pay on the death of a child any sum of money which, added to the amount payable on the death of the child by any other company, society, branch or trade union exceeds 6*l.* if the child dies under three years of age, 10*l.* if it dies at or under six, and 15*l.* if it dies at or under ten."

It was not the duty of the Industrial Assurance Commissioner under s. 21, sub-s. 1, of the Industrial Assurance Act, 1923, to approve the statement of the effect of s. 62 of the Friendly Societies Act, 1896, and the said proviso had not been approved by him.

6. When the said policy was issued it was endorsed with the two following endorsements:—

"The premium in this case being twopence the amounts stated in Schedule B are increased in proportion subject to the conditions of the Friendly Societies Act."

"Schedule B. Re amount payable at death before age ten is subject to reduction in accordance with the terms of the Industrial Assurance Act, 1923, as stated in the second proviso on the face of the policy."

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7. As to the first ground of claim set out in para. 5 hereof, the said Ellen Louise Smith contended that the first endorsement in its opening words increased the amounts insured and payable to double the amounts stated in Schedule B, and the policy therefore insured amounts in excess of those permitted by s. 2, sub-s. 1, of the Friendly Societies Act, 1924. She contended that the remaining statements in the endorsements were not sufficiently certain to reduce the amounts so insured to the permitted limits. She relied in particular on the Commissioner's written decision dated June 15, 1931, and given in the matter of Annie McGuire and the company, on policies which were identical in all material respects with the policy in the present case. The decision, after setting out the particulars of the policies, proceeded :—

"The claim is for return of premiums on each policy under section 5 of the Act of 1923 on the ground that it is illegal inasmuch as it assures for more than the statutory amounts. The company contends that the amounts are not exceeded, inasmuch as each of the endorsements, coupled with the proviso referred to in one of them, is part of the contract and cuts down the sum assured to the statutory amount, and it relies on the decision in *In re Hirst and Liverpool Victoria Friendly Society* (1) and distinguishes *Harker* v. *Britannic Assurance Co., Ld.* (2) I am inclined to agree that the distinction between that case and *Harker's* case (2) is that the cutting-down proviso in the former case was held to be contractual, whereas in the latter it was not. But adopting this view for the moment, let me see what the endorsements in the present case actually provide.

The second endorsement purports to reduce the sum payable at death before age ten in accordance with the second proviso. That proviso, which is in a form not in accordance with the relevant provisions of the Acts in force at the date of the issue of the policy, sets out that it is illegal to insure or pay a sum which added to the amount payable on the death of a child by any other 'company' and so on exceeds so much.

(1) [1930] 2 K. B. 209. (2) [1928] 1 K. B. 766.

It does not state that it is illegal to insure or pay a sum which under the particular policy in question exceeds so much, quite apart from any sum payable by the other company, etc. The endorsement, therefore, if it be regarded as contractual, does not cut down the sum payable on death under age ten under the particular policy or, as a matter of fact, any policy issued by the same company.

The other endorsement increases the amounts payable under the Schedule ' subject to the conditions of the Friendly Societies Act.' It does not state what those conditions are, and the only place in the policy where they are stated is the proviso, which, as I have already said, does not state them as cutting down the sum payable at death under age ten under the particular policy. This, therefore, is ineffective and there is left merely a statement that the Friendly Societies Act applies, and that is the platitude which was held in *Harker*'s case (1) to have no legal effect. Indeed the proviso in that case was much more specific than the endorsement in the present case and did not mislead, as this endorsement, by its reference to a misleading proviso, misleads.

I hold, therefore, that these policies assure more than the statutory amounts and are illegal and award to the applicant payment of a sum equal to the premiums paid and of the fee for the award. In the view that I take it is unnecessary for me to decide the further point, which was raised, namely, whether the proviso complies with section 21 of the Industrial Assurance Act, 1923, which requires a statement of the effect of section 62 of the Friendly Societies Act, 1896, to be set out on every policy of industrial assurance issued after January 1, 1924."

On this first ground of claim the said Ellen Louise Smith also contended that the second endorsement in purporting to reduce the amount payable at death " before age ten " left unreduced the amount insured or payable at death " under six " or " under three " and that in the case of death " under three " the amount insured and payable was in any event in excess of the permitted amount.

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(1) [1928] 1 K. B. 766.

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8. As to the second ground of claim set out in para. 3 hereof the said Ellen Louise Smith contended :—

(*a*) that the policy did not set out a statement of the effect of s. 62 of the Friendly Societies Act, 1896, as it had been amended at the date of the issue of the policy by s. 2, sub-s. 1, of the Friendly Societies Act, 1924. The said section before such amendment in terms only prohibited the payment of a sum which "when added to the sum payable on the death of a child by any other society or branch" (or industrial assurance company or trade union, by virtue of s. 4, sub-s. 1, of the Industrial Assurance Act, 1923, and s. 2 of the Trade Union Act Amendment Act, 1876) "exceeds" the sums therein specified. As amended by the Friendly Societies Act, 1924, the said section prohibits the payment of any sum by any society or branch, industrial assurance company or trade union, exceeding the sum therein specified. The difference therefore was material, as the effect of the section, as amended, was to cut down the sums payable under the policy now in question to the sums specified in the section, whereas the effect of the section as unamended was to leave the sums assured by the policy now in question in excess of the sums specified in the section and therefore in excess of those legally payable. The statement in the policy retained the loophole which the amended section had stopped.

(*b*) that the statement on the policy says that it is illegal for the company to insure or pay a sum exceeding 10*l.* if the child dies "at or under" six or 15*l.* if it dies "at or under" ten, whereas the section of the statute only makes such payment illegal "under six years of age" and under "ten years of age" respectively. The introduction by the company of the words "at or" rendered the statement on the policy incorrect in respect of at least one whole day and possibly one year.

9. The company contended

(*a*) that the said policy did not infringe either s. 62 of the Friendly Societies Act, 1896, or s. 21, sub-s. 1, of the Industrial Assurance Act, 1923.

(*b*) that the said endorsements read with the said proviso made it clear that the amount assured did not exceed the amount specified in the statutes in that behalf.

(*c*) that, if it was necessary to consider the decision in *Harker* v. *Britannic Assurance Co., Ld.* (1), it was inconsistent with the decision in *In re Hirst and Liverpool Victoria Friendly Society* (2), or in any event was to be regarded as a decision on the wording of a particular policy and was not to be extended.

(*d*) that the said proviso substantially set out the effect of s. 62 of the Friendly Societies Act, 1896.

(*e*) that the words "exceeds or which when" added to s. 62 of the Friendly Societies Act, 1896, by s. 2, sub-s. 1, of the Friendly Societies Act, 1924, were merely words of caution and added nothing to the meaning, and the Court was referred to the decision in *Connors* v. *London and Provincial Assurance Co.* (3)

(*f*) that s. 62 of the Friendly Societies Act, 1896, in itself might have to be strictly interpreted as being a penal section, but here the question was not the interpretation of the section but whether the effect of it was sufficiently set out, and a strict interpretation should not be applied for that purpose.

10. The questions for the opinion of the Court were :—

(*a*) Whether the said policy was illegal ;

(*b*) Whether the said policy set out a statement of the effect of s. 62 of the Friendly Societies Act, 1896, as amended by s. 2, sub-s. 1, of the Friendly Societies Act, 1924.

If the Court answered either the former question in the affirmative or the latter question in the negative, then the Commissioner awarded that the company should pay to the said Ellen Louise Smith a sum equal to the amount of the premiums paid by her, that was to say, 1*l.* 17*s.* 8*d.* If the Court answered the former question in the negative and the latter question in the affirmative, then the Commissioner awarded that the claim of the said Ellen Louise Smith be dismissed.

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(1) [1928] 1 K. B. 766.

(2) [1930] 2 K. B. 209.

(3) (1913) 47 Ir. L. T. 148; [1913] W. C. & Ins. Rep. 408.

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In any event the company had undertaken to bear the costs of the reference to the Commissioner and the costs of and incidental or preliminary to the special Case and the costs of both parties in obtaining the opinion of the Court; and in the event of the company desiring to appeal to the Court of Appeal or House of Lords, the company had undertaken to bear the costs of both parties in any such appeal.

The special Case came before Swift J., who, after stating the facts, said: " Before the learned Commissioner and before me it was contended on behalf of the appellant, Mrs. Smith: first, that the policy was illegal in that under it a sum is assured exceeding the amount specified in s. 62 of the Friendly Societies Act, 1896, as amended by s. 2, sub-s. 1, of the Friendly Societies Act, 1924, and that therefore s. 5 of the Industrial Assurance Act, 1923, avoids the policy and renders the assurance company liable to repay to the appellant the amount which she had paid them in premiums; and, secondly, that the policy does not comply with s. 21 of the Industrial Assurance Act, 1923, inasmuch as it does not set out a statement of the effect of s. 12 of the Friendly Societies Act, 1896, as amended by s. 2, sub-s. 1, of the Friendly Societies Act, 1924, and that, therefore, again s. 5 of the Industrial Assurance Act, 1923, was applicable and entitled her to recovery of the premiums paid.

In my view both these contentions are wrong. In support of the appellant's case Mr. Denning relied upon *Harker* v. *Britannic Assurance Co., Ld.* (1); but I think that the true principles upon which this matter is to be decided are to be found in *In re Hirst and Liverpool Victoria Friendly Society.* (2)

I accept the law as laid down there, and, applying it to this particular case, I hold that the policy does not promise to pay a sum exceeding the amount specified in s. 2, sub-s. 1, of the Friendly Societies Act, 1924: nor do I think that there had been any failure to set out with quite sufficient fullness the effect of s. 62 of the Friendly Societies Act, 1896, as amended by s. 2, sub-s. 1, of the Friendly Societies Act, 1924.

(1) [1928] 1 K. B. 766.

(2) [1930] 2 K. B. 209.

In my view the amendment of s. 62 of the Act of 1896 by s. 2, sub-s. 1, of the Act of 1924, was merely made for the purpose of showing more plainly that the amount not to be exceeded was to be arrived at by considering all policies in existence and not only those issued by different societies, branches, or companies. If the amendment had never been made, I am of opinion that upon the true construction of s. 62 as it originally stood it would have been applicable to all policies, whether in the same society, branch, or company or not; and I do not think that the effect of the amendment makes any substantial alteration in the law, or that there is any real defect in the statement of what the law requires in the language on the face of the policy. The statute does not require that the words of the section should be set out, it only requires that the effect of the section should be stated, and, in my opinion, this has been substantially done.

I therefore hold (*a*) that the policy is not illegal; and (*b*) that the policy does set out a statement of the effect of s. 62 of the Friendly Societies Act, 1896, as amended by s. 2, sub-s. 1, of the Friendly Societies Act, 1924.

This decision of mine carries with it the consequences set out by the learned Commissioner in his award."

Mrs. Smith appealed.

A. T. Denning for the appellant. The insurance policy in question is illegal as having failed to limit the amounts payable to the child as provided in s. 62 of the Friendly Societies Act, 1896, as modified by the Friendly Societies Act, 1924, s. 2, sub-s. 1 (1), which substituted a new section.

(1) Friendly Societies Act, 1924, s. 2, sub-s. 1: "Section sixty-two of the Friendly Societies Act, 1896 (which relates to assurances on children), both as originally enacted and as applied to trade unions and industrial assurance companies, shall have effect as if for that section the following section were substituted:— 'A society or branch, whether registered or unregistered, shall not insure or pay on the death of a child under the ages hereinafter specified any sum of money which exceeds, or which, when added to any amount payable on the death of that child by any other society or branch or by any trade union or industrial

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By doubling the payments in Schedule B of the policy the limits were clearly exceeded, and the added words in the endorsement "subject to the conditions of the Friendly Societies Act" were altogether too vague; and similarly the second endorsement stating that the amount payable at death before age ten was "subject to reduction in accordance with the terms of the Industrial Assurance Act, 1923, as stated in the second proviso on the face of the policy" was too general, especially as it referred back to a proviso which did not accurately state the effect of the new s. 62: *Harker* v. *Britannic Assurance Co., Ld.* (1) That case was distinguished in *In re Hirst and Liverpool Victoria Friendly Society* (2), but this case falls exactly within the principle of the earlier decision. The appellant is therefore entitled on this ground to have the insurance policy declared illegal and her premiums refunded under s. 5 of the Industrial Assurance Act, 1923.

The proviso in question fails accurately to state the effect of the new s. 62, as required by s. 21, sub-s. 1, of the Industrial Assurance Act, 1923, in two particulars. The assurance company has inserted in two cases of the age limits "at or under" for "under." As to the effect of this compare *In re Shurey* (3) and *Rex* v. *Chapman.* (4) That being so a breach of s. 2, sub-s. 1, of the Act of 1923 has been committed, and by s. 5, sub-s. 1, of the same Act the premiums paid on the policy are now repayable. But a more important ground for this is the failure to state the effect of the new s. 62 by only stating that it is illegal "to insure and pay on the death of a child any sum of money which, added to the amount payable on the death of the child by any other company, society, branch or trade union exceeds" the specified amounts. That omits the words in the new section limiting

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assurance company exceeds, the amounts hereinafter specified; that is to say:—

(*a*) In the case of a child under three years of age, six pounds;

(*b*) In the case of a child under six years of age, ten pounds;

(*c*) In the case of a child under ten years of age, fifteen pounds.'"

(1) [1928] 1 K. B. 766.

(2) [1930] 2 K. B. 209.

(3) [1918] 1 Ch. 263.

(4) [1931] 2 K. B. 606.

the amount payable also to any sum of money which itself exceeded those amounts. That was an important modification in the new section and filled up a loophole left by the old section. This was recognized in *In re Hirst and Liverpool Victoria Friendly Society.* (1) For this reason also the appellant is entitled to repayment of the premiums.

[He also referred to *Smith* v. *Ridgway.* (2)]

S. L. Porter K.C. and *Blanco White* for the respondents. The statutes in question here are penal statutes and should be construed most favourably to the person sought to be charged with an infringement: *In re Hirst and Liverpool Victoria Friendly Society.* (3) Then has the assurance company been shown to contravene the Act in this policy? It is contended that it has properly limited the amount payable in accordance with the new s. 62 by means of the two endorsements. The case is really covered on this point by *In re Hirst and Liverpool Victoria Friendly Society* (3), distinguishing *Harker* v. *Britannic Assurance Co., Ld.* (4)

[They were stopped.]

A. T. Denning replied.

LORD HANWORTH M.R. This appeal fails and must be dismissed.

The point raised is of a somewhat intricate nature, involving close consideration of several Acts of Parliament and a policy of insurance; and we are indebted to Mr. Denning for an admirable argument, for in spite of the intricacy of the matter he has presented a clear argument in favour of the appellant. In spite of that, however, we feel bound to hold that the order of Swift J. must be confirmed.

The point arises upon a policy of insurance taken out by a mother on her little child, Ronald Charles Smith; he was born on May 2, 1927, and she signed a proposal for a policy on June 4 of that year, the premium to be the payment of 2*d.* a week, and on June 11 of that year the policy was issued.

The question that arises is whether that policy is valid or not. The reason why it is said to be invalid is that the

(1) [1930] 2 K. B. 209, 216, 217.
(2) (1866) 35 L. J. (Ex.) 198.
(3) [1930] 2 K. B. 209, 221.
(4) [1928] 1 K. B. 766.

Legislature has, with regard to these industrial insurances, enacted certain provisions which have to be followed. The original Act which dealt with the matter was the Friendly Societies Act, 1896, which by ss. 62 to 67 dealt, according to the heading of that fasciculus of sections, with "Payments on death of children." Sect. 62 provides: "A society or branch, whether registered or unregistered, shall not insure or pay on the death of a child under five years of age any sum of money which, added to any amount payable on the death of that child by any other society or branch, exceeds six pounds, or on the death of a child under ten years of age any sum of money which, added to any amount payable on the death of that child by any other society or branch, exceeds ten pounds."

That section therefore contained two steps, the child under five years and the child under ten years old. That has been altered by subsequent legislation. Sect. 4, sub-s. 1, of the Industrial Assurance Act, 1923, introduced three steps: children under three years of age, children under six years of age, and children under ten years of age, and s. 62 was to be amended accordingly.

In the year 1924 a further alteration was made by the Friendly Societies Act, 1924, which by s. 2, sub-s. 1, declared: "Section sixty-two of the Friendly Societies Act, 1896 . . . . shall have effect as if for that section the following section were substituted," and then we have the words which are now to be treated as having been originally inserted in the Act of 1896, and hold the field as s. 62 instead of the words which originally stood in the Act of 1896. For the purposes, therefore, of this policy made in 1927 we have to look at the words to be found in the Friendly Societies Act, 1924, to ascertain what are the terms of s. 62 of the Act of 1896.

One other provision must be referred to, and that is s. 21 of the Industrial Assurance Act, 1923, which provides: "A policy of industrial assurance issued after the commencement of this Act shall set out the provisions of this Act mentioned in the Third Schedule to this Act, such of those provisions as are contained in Part II. of that Schedule being printed in distinctive type, and in the case of a policy on the life of a child under ten years of age shall also set out in distinctive type a statement of the effect of section sixty-two of the Friendly Societies Act, 1896."

The upshot of all those legislative provisions is that in a policy of industrial assurance there is a limit on the amount to be insured which is now to be found in s. 2, sub-s. 1, of the Act of 1924, which enacts an amended form of s. 62 of the Friendly Societies Act, 1896, and also that the policy has got to set out in distinctive type a statement of the effect of that s. 62. It is to be noticed that it is the effect of the section, and not its actual terms, which has to be set out.

I turn to the policy, which has been criticized by Mr. Denning with great cogency on two grounds. It is said that the policy offends against the limits which are imposed by s. 62—and when I say s. 62 I mean the new s. 62—and further that it does not comply with the requirements of s. 21 of the Industrial Assurance Act, 1923, because it does not set out in distinctive type a statement of the effect of s. 62. It is noticeable that the terms of the policy are somewhat curious, because it is to the effect that, given certain payments, and so on, the policy of assurance witnesses that: "The Company will allow the privileges to policy holders hereinafter contained and upon receipt of reasonable proofs of the death of the assured will pay" to the parent or guardian such amount as according to the age of the assured and the duration of the policy is ascertainable from the Table contained in Schedule B thereto. I notice those terms, because the policy does not say simply that it will insure, or assure, or hold insured, but that it "will allow the privileges to policy holders hereinafter contained." Upon the whole I come to the conclusion that that is the right way of stating the effect of the policy, for it would be very difficult to state with precision exactly what benefit the policy does in all events provide for the assured; to some extent it must depend upon the action of the assured, and on whether there are other sums coming in on the death of the child from any other company, society, branch or trade union. To that extent it is like a fire policy to which the principle of average applies.

What the policy says is, that it will allow the privileges thereinafter contained and will pay "such amount as according to the age of the assured at entry and the duration of this policy is ascertainable from the Table contained in Schedule B hereto." That is a clear indication that the insurance is not for an absolute sum, but is according to circumstances for varying sums to be ascertained by calculations that have to be made under the Table set out in Schedule B. There are two Schedules, of which the first (Schedule A) states the weekly premium, and the second, Schedule B, states the basis upon which the payment to be made under the policy has to be ascertained. In the policy in the present case there is in Schedule A a correction; the form of policy used is appropriate to a payment of a 1*d.* premium each week, and it is altered to a 2*d.* premium, whilst above is written: "See Endorsement." We have to ascertain the effect of that alteration. The endorsement is as follows: "The premium in this case being twopence, the amounts stated in Schedule B are increased in proportion subject to the conditions of the Friendly Societies Act." When once it is appreciated that the promise on the part of the insurance company is to pay a sum ascertainable from the Table contained in Schedule B as opposed to a fixed sum, then it appears fair enough to state that the amounts in the Table in Schedule B are to be increased in proportion; and then follow the words: "subject to the conditions of the Friendly Societies Act." The effect of that is not difficult to ascertain, because the proviso in the policy states the effect of s. 62 of the Friendly Societies Act. The original terms of the policy were to grant certain privileges not fixed but ascertainable, and the alteration made introduces a proportionate modification of the Schedule, which is subject to the conditions of s. 62.

Two cases have been decided in regard to this kind of policy: *Harker* v. *Britannic Assurance Co., Ld.* (1), and *In re*

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(1) [1928] 1 K. B. 766.

Hirst and Liverpool Victoria Friendly Society. (1) In *In re Hirst and Liverpool Victoria Friendly Society* (1) Scrutton L.J. said, when dealing with the facts of that case (2): "The effect of that clause, the draftsmanship of which is not beyond criticism, appears to be this: 'For 2*d.* we are insuring those sums except in cases where they would exceed the statutory limit, in which case the sum assured shall be restricted to that limit.' That seems to be substantially the same as the provision: 'We assure the said sums except in the named cases, in which we only assure so much.' Read in that way, and I think it should be so read, there seems to me to be no insurance which contravenes the Act." Therefore, in a case almost identical with the present one, he pointed out that the terms of the contract may vary the original terms, and may, by providing that the statutory conditions shall apply, restrict according to the facts ultimately ascertained upon the death the sum which is ultimately to be paid under the policy. I come, therefore, to the conclusion that this contractual statement is valid and in accordance with the restrictions of the Acts of Parliament to which I have referred.

I will only add one word about *Harker* v. *Britannic Assurance Co., Ld.* (3) To my mind the decision in that case turned upon the actual terms in the policy there, and the short effect of the clause construed was: The provisions of the Act of Parliament fixing maximum payments on the death of a child under five and ten years old respectively shall apply to this policy. That statement was held to be otiose in its effect, because to say that an Act of Parliament shall apply to a policy is no more than to say that the policy must be subject to the law of the land. I think that is what is meant in the judgment of Branson J. (4), when he says: "The only point upon which I desire to add anything is the question whether the respondents have insured for an amount in excess of the statutory limit. Clearly they have, unless proviso 2 operates contractually (*a*) in the case

(1) [1930] 2 K. B. 209.
(2) Ibid. 219.
(3) [1928] 1 K. B. 766.
(4) Ibid. 775.

of the third policy to cut down the amount specified in the policy itself, and (*b*) in the case of each policy to cut down the amount specified therein because of amounts insured by the other policies." Then he goes on to say (1): "I decline to depart from the plain meaning of the language used in order to enable the company to say that though they have taken premiums under the third policy which according to the table incorporated therein entitled the assured to 9*l.*" they are only liable to pay 6*l.* I think that Branson J. makes it plain that he felt it impossible to construe the clause contractually; he felt that the clause must be taken according to its true tenor, and therefore not as part of the contract made between the parties. On that ground, the case stands quite apart from *In re Hirst and Liverpool Victoria Friendly Society* (2), in which Scrutton L.J. expressed his opinion that where the amount payable under the policy is limited by contract so as to comply with the statute, then the Act is not offended. Having regard to the operative terms of the policy, and in particular the proviso and the endorsements, I think both the endorsements are introduced into the contract, and substantially alter it, so as to bring it within the terms or the restrictions imposed by s. 62.

The second point to be determined is whether s. 62 is or is not adequately or effectively stated in the proviso. What has to be put into the policy is a statement of the effect of the section. It is said that the proviso does not comply with that, because it does not set out the actual terms of the statute. The answer is, of course, that it need not do so, it has only to state the effect. Then it is said that it states the effect of the section as making it illegal to insure or pay any sum of money "which added to the amount payable" exceeds the specified limit, instead of saying that it makes it illegal to insure or pay any sum of money "which exceeds or which, when added to the amount payable," exceeds that limit; and further, that it uses in regard to the ages mentioned in specifying the appropriate limits, "at or under" six and "at or under ten," instead of "under six" and "under ten." But, after all, we have got to construe a statement of this sort fairly, and we ought not to be astute to try and find some discrepancy from the statute in order to impose what really is a penal result upon the company. Construing this clause reasonably I think that, inasmuch as the proviso refers to the amount payable by any other company, society, branch or trade union, it is right and quite easy to construe the words "which added to the amount" as meaning "which added to the amount if any," the words "if any" being introduced by the reference to "any other company, society, branch or trade union."

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(1) [1928] 1 K. B. 775.

(2) [1930] 2 K. B. 209.

In those circumstances, looking at this proviso fairly, I think it does express the effect of s. 62, and the result is that s. 21 of the Act of 1923 is complied with.

I will only add this: it is of great importance that these policies should be as plain and as easy to construe as it is possible to make them, having regard to the nature of the contract which they contain; the contract is not easy to express in absolutely plain terms, because it is intended to provide for certain alternative events, but it is certainly unfortunate to use a policy intended for a penny premium where the premium is increased to twopence. It would be very easy to put the matter right by insisting upon the agents using the proper policy. And, again, I think that the second point on which Mr. Denning has insisted could be obviated by an alteration of the proviso in the leaded type. I have no doubt that these matters have had consideration by the insurance company, but I make these observations, because it is unfortunate that any policy should be used in the sphere of industrial insurance which does not give effect to the effort made by the Legislature to make matters plain to the insurers, who are usually not the best informed of people.

SLESSER L.J. I agree. The appellant, Ellen Louise Smith, claims from the respondent company the return of the premiums paid by her or of a sum equal to those premiums, under two sections of the Act of 1923: first, under s. 5 on the ground that the policy is illegal, inasmuch as the sum insured under it exceeds the amounts allowed by the Friendly Societies Acts; and, secondly, under s. 21 of the Act of 1923, on the ground that the policy does not set out a statement of the effect of s. 62 of the Friendly Societies Act, 1896. I propose to deal with these matters separately. It is not necessary for me to repeat the provisions of the statutes which have been referred to by my Lord, but I will immediately apply the provisions of those statutes to the policy which we have here to consider.

Now as to the first point, the method which has here been employed to keep the amount insured within the limitation provided by the Friendly Societies Acts appears to me to have been approved in *In re Hirst and Liverpool Victoria Friendly Society.* (1) The particular language of each policy has to be considered to see whether or not the limitation has been successfully achieved; but the general method of stating that a policy will bring in a certain sum, provided that the amount secured shall not exceed the limit of the insurance permitted by the Friendly Societies Acts, is a method of limitation which I understand that case to have decided may properly be employed. It cannot be said that the assurance company is bound to make in a policy of this kind the direct statement that the amount assured is not more than the sum allowed by the statute. The company can proceed, by doubling or increasing the premium, to increase the sum already insured, provided that the policy, in appropriate language, limits the amount which is insured, which the company can be required to pay, to the amount permitted by the Acts of Parliament.

I find myself unable to distinguish the language here in principle from that which was employed, and successfully employed, in *In re Hirst and Liverpool Victoria Friendly Society.* (1) There, the language was: "Twopence per week will assure double the above sums, provided that in any case where the amount secured by the larger premium would exceed the limits of assurance prescribed by the

(1) [1930] 2 K. B. 209.

Friendly Societies Act, 1896, viz., 6*l.* for children under five years of age, and 10*l.* for children under ten years of age, the sum assured shall be limited to 6*l.* or 10*l.* as the case may require."

In the present case it is first of all stated in the endorsement: "The premium in this case being twopence the amounts stated in Schedule B are increased in proportion"; and Mr. Porter has conceded, and I think rightly, that so far the endorsement means that as the amount of the premium has been increased from a penny to twopence, so also the amounts in Schedule B would be normally doubled. If then the endorsement were to end there, it is clear that there would be a breach of the provisions of the Friendly Societies Act, as too much would be insured; but it goes on: "Subject to the conditions of the Friendly Societies Act." It is said by counsel for the appellant that that is altogether too vague: it is clear to my mind that the condition is dealing with the amounts insured, because the endorsement says that the amounts stated shall be increased subject to the condition, and the statutory conditions dealing with the amount insured are easily to be found. I think, therefore, that the endorsement is a contractual obligation to insure and to pay an amount which may be described algebraically as 2 x minus y, that is, double the original amount set out in the Schedule, less the sum by which that amount is in excess of what is permitted by the Act; but the matter does not end there, because the company have gone on to make a further endorsement, headed "Schedule B," which is the Schedule dealing with the amounts to be paid at the death of the child: "Re amount payable at death before age ten is subject to revision in accordance with the terms of the Industrial Assurance Act, 1923, as stated in the second proviso on the face of the Policy."

Now, as my Lord has pointed out, the Industrial Assurance Act, 1923, amends the Act of 1896. So far as the operative words of the Act of 1923 are material in this case, they are repealed by sub-s. 3 of s. 2 of the Friendly Societies Act, 1924, and s. 62 of the Act of 1896 is, by s. 2, sub-s. 1, of the Act of 1924, to have effect "as if for that section the following section were substituted." The result is that s. 62 of the Friendly Societies Act, 1896, still exists; the amendment of it in the Act of 1923 has been repealed, but s. 62 has now to be read as if it was in the terms set out in sub-s. 1 of s. 2 of the Act of 1924. I have mentioned that, because criticism is made by Mr. Denning of the particular way in which this proviso is dealt with in this policy. The proviso says that the policy is issued "subject to the provisions of section 62 of the Friendly Societies Act, 1896," and that, in my view, is an accurate statement, because s. 62, after the passing of the 1924 Act, must be read as if it had the effect there provided. The proviso goes on: "as amended by the Industrial Assurance Act, 1923"—that is also accurate, because although, as I have said, a part, the part dealing with amounts with which we are here concerned, of the Act of 1923 has been repealed, yet s. 4 remains standing and applies the Act and extends it to industrial insurance companies "as if those provisions were herein re-enacted." It is thus strictly accurate to treat s. 62 of the Act of 1896, as amended by the Act of 1924, as being still amended by the Act of 1923, s. 4, sub-s. 1, in so far as the first paragraph of that section is still alive and has not been repealed by the Act of 1924. Therefore, I think that that proviso is an accurate statement, and correctly describes the limitations.

Then it is said that the proviso is wrong in regard to two different matters. It goes on to say: "which provisions make it illegal for any industrial insurance company to insure or pay on the death of a child any sum of money which added to the amount payable on the death of the child by any other company, society, branch, or trade union exceeds 6*l.* if the child dies under three years of age, 10*l.* if it dies at or under six and 15*l.* if it dies at or under ten"; and the argument, as I understand it, is that the endorsement, by limiting the amount which would otherwise be paid as a result of doubling the sums mentioned in Schedule B, by reference to the proviso leaves open a contractual obligation to pay amounts which are double the sums mentioned in Schedule B, even when they exceed the statutory limits in the cases where no sum is payable by any other company, society, branch, or trade union. It is said that this is so because, instead of using the language of the Act of 1924, the draftsman of this policy has thought fit to say: "any sum of money which added to the amount payable on the death of the child." I think that is a very fine point, which might be worthy of careful consideration on an originating summons, or would possibly have served in objecting to an indictment in the early days of the criminal law; but this section is a penal section against the assurance company, and has to be construed with liberality and common sense, and the real meaning is quite clear to my mind. The Act limits payments, whether made by the society only or made by the society and some other body, which together bring the amount paid above the maximum allowed, and I think that the proviso when read as a whole, with due regard to the fact that the section of the Act is referred to, is seen to contain at most only a misdescription of the section, and that the words of limitation mean whether the sum of money by itself exceeds the statutory amount, or exceeds it by adding to what would not by itself exceed it an amount payable by some other society or body. In either case any amount above the maximum is not an amount for which the company insures, or which it will pay, and therefore I come to the conclusion on the first point that the appellant's argument is ill-founded.

The second point is whether under s. 21 of the Act of 1923 the company has committed an offence by not setting out in distinctive type a statement of the effect of s. 62. My Lord has already pointed out, and I have also stated, that the effect of s. 62 is now as provided in the Act of 1924, and there is therefore no point in the argument that the Act of 1924 is not specifically mentioned.

As I have already said, two criticisms are made of the proviso. One I have already referred to, and will not deal with further. It is levelled at the failure to follow strictly the language of the Act of 1924, by saying: "any sum of money which exceeds, or which when added to any amount payable . . . . by any other company, society, branch, or trade union exceeds." As to that I have already expressed my view that the section is in substance correctly stated.

The only other point is that, for some reason I do not understand, while the proviso speaks of children under three years of age, when it comes to deal with children of six or ten years of age it says "at or under" the age of six or ten, as the case may be. I desire to emphasize, in the first place, that the words of the proviso are words only intended to describe the effect of s. 62, and not to set out the section itself; and the word "at" preceding the word "under" seems to state, assuming "at" to mean something other than "under," that the age at which it becomes lawful to pay the larger sum is higher than the statute actually states. The statute merely limits payments under a certain age, and the words in the proviso seem to indicate that a larger sum may not even be paid at that age. That does not remove any limitation imposed by the statute; it merely represents the statute as more drastic than it really is. I think that enables me to say that the effect of the statute has been properly described. On these grounds I am of opinion that this claim must also fail.

ROMER L.J. The first question to be determined on this appeal is whether under the policy the child has been insured for sums in excess of the amounts permitted by s. 62 of the Friendly Societies Act, 1896, as applied to industrial assurance companies. That is purely a question of construction of this particular policy, and we have to ascertain what sums have been contracted to be paid on the death of the child in question, and then see whether those sums are in excess of the amounts permitted by the Act.

It appears to me plain, having regard to the two endorsements on the policy, that the contractual liability of the assurance company is not in excess of the amounts permitted by the Act. I say no more upon that point.

The second question arising upon the appeal is whether the assurance company has complied with the provisions of s. 21, sub-s. 1, of the Industrial Assurance Act, 1923, and has set out in the policy a statement of the effect of s. 62 of the Friendly Societies Act, 1896. It is unnecessary perhaps to add that that section means that the effect of s. 62 as applied to industrial assurance companies must be set out in the policy. In order to answer that question, we have to ascertain for ourselves what is the effect of s. 62 of the Friendly Societies Act, 1896, or rather what was the effect of it before the year 1924 when the Friendly Societies Act, 1924, came into operation. The words of the section are as follows: "A society or branch, whether registered or unregistered, shall not insure or pay on the death of a child . . . . any sum of money which, added to any amount payable on the death of that child by any other society or branch, exceeds" in certain events the respective sums mentioned. Is it possible to construe that section standing by itself, looking at no other part of the Act, as merely prohibiting an insurance in excess of the amounts mentioned in cases where insurances are issued on the child's life by two or more societies or branches? It appears to me perfectly impossible so to construe the section. It is a necessary implication, though it may not be said in express terms, that no society can insure a child under the ages mentioned in excess of the sums that are mentioned, whether there be or be not any other policy on the child's life. That section was dealt with in the year 1924 in a somewhat unusual way; it was not repealed or amended, but by s. 2, sub-s. 1, of the Friendly Societies Act, 1924, it was provided that that section: "Both as originally enacted and as applied to trade unions and industrial assurance companies,"—it had been applied to industrial assurance companies by the Act of 1923—"shall have effect as if for that section the following section were substituted." In other words, the section is left unamended and unrepealed, but Parliament says that as from the passing of this Act it is to be read as though it did mean something which it does not say.

Now what it did not say in the Act of 1896 was that in the case of a child under three years of age the amount should not exceed 6*l.* What it had said was that the amount should not exceed 6*l.* in the case of a child who died under the age of five years, and to that extent the effect of the Act is altered, but I do not think that the effect of the Act was altered in any other respect. Sect. 2, sub-s. 1, of the Act of 1924 also makes it clear that s. 62 is to apply, even in the case of a single policy. In my opinion, that was really perfectly clear before, but in the Act of 1924 it is for the first time enacted in express terms, and not left to necessary implication, as it was before. I mention that for this reason. As has been pointed out by my Lord, the reference to the section in this policy is in these terms: "This policy is issued subject to the provisions of section 62 of the Friendly Societies Act, 1896, as amended by the Industrial Assurance Act, 1923" —in fact, it was not amended by that Act, it was applied to the Industrial Assurance Act with alterations—" which provisions make it illegal for any industrial assurance company to insure or pay on the death of a child any sum of money which added to the amount payable on the death of the child by any other company, society, branch, or trade union exceeds 6*l.* if the child dies under three years of age, 10*l.* if it dies at or under six, and 15*l.* if it dies at or under ten." Therefore, the effect of the section is stated in the language employed by the Legislature in the year 1896, substituting only the alterations made in the section which applied it to industrial assurance companies. The proviso does not use the express language which had been introduced by the Act of 1924; but, in my opinion, it would be impossible to say that this society has not correctly stated the effect of s. 62 of the Act of 1896, when it has used the very language which had been used by the Legislature from the year 1896 to the year 1924 to bring about that effect. That being so, it is impossible to say that the company has not correctly stated the effect of the section.

There is only one other point that I want to mention. It was pointed out by Mr. Denning in his excellent argument, that not only is the effect of the section here stated, but something is stated in addition. When one looks at the proviso in the policy, leaving out the words "at or" in the last line but one, and in the last line, it will be found that the effect of the section as applied to industrial assurance companies is accurately stated, so that the assured knows precisely that if the child died under the age of three years the company cannot pay more than 6*l*., that if the child dies under the age of six the company cannot pay more than 10*l*., and that if the child dies under the age of ten the company cannot pay more than 15*l*. The effect of the section is accurately stated, but in the case of the child who dies under the age of six or under the age of ten, as the case may be, the words "at or" are introduced so that the insured is told that even if the child dies at the age of six not more than 10*l*. can be paid, and if the child dies at the age of ten not more than 15*l*. can be paid. It is said that this is not in accordance with the section of the Act, that is to say, that the section of the Act does not limit the payment in that event to these sums. Whatever effect that addition may have upon the contractual relations of the parties under this policy, as to which I say nothing, it does not, in my opinion, enable it to be said that the company has failed to comply with the obligations imposed upon it by s. 21, sub-s. 1, of the Industrial Assurance Act, 1923. For these reasons I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Fladgate & Co.; Kingsley Wood, Williams & Co.*

H. C. G.

K. B. D.
1932
May 31;
June 10.

C. A.
July 21.

OSWALD TILLOTSON, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp Duty—" Conveyance or Transfer on Sale"—Claim for Exemption—Company—Reconstruction—Consideration for Acquisition—Issue of Shares in New Company—Letter of Allotment sent to Holders of Shares in Old Company—Form of Renunciation on Back—Sale of a number of Shares before Registration—Shares renounced in favour of Relatives—" Issue" of Shares—Whether Issue complete on the sending of Letter of Allotment—First Registered Holders of Shares in New Company different to Shareholders of Old Company by more than 10 *per cent.—Stamp Act,* 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 1, 59; *First Schedule—Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 55.

A company passed a resolution for its reconstruction and voluntary winding-up. An agreement was accordingly entered into by the company and its liquidator for the sale of its undertaking and assets to a new company in consideration of the discharge of certain liabilities of the old company and the allotment to its liquidator or his nominees of 340,000 shares in the new company, and certain conveyances and assignments were in pursuance of the agreement made by the old company and its liquidator to the new company. The liquidator nominated three persons, who were the shareholders of the old company, as the persons to whom the 340,000 shares in the new company should be allotted. The new company sent a letter of allotment to each of those three shareholders in the old company for the shares so directed to be allotted to him. Each letter of allotment contained on its back a form of renunciation. One of the shareholders, who had received a letter of allotment for 270,000 shares, immediately sold and renounced 40,000 of the shares before being registered. Another shareholder, who had received a letter of allotment for 55,000 shares, directed that 14,000 of the shares should be registered in the names of certain relations, and those shares were duly renounced by him. As a consequence the first registered holders of shares in the new company were, to an extent exceeding 10 per cent. of such shares, persons who were not holders of shares in the old company. The Inland Revenue Commissioners assessed the agreement for sale and the conveyances and assignments to ad valorem stamp duty. The new company appealed against the assessment, claiming that they were entitled to exemption from stamp duty under s. 55 of the Finance Act, 1927. Upon the appeal it was contended that the issue of the shares in the new company was complete when the letters of allotment were sent to the shareholders of the old company, who as from that time had complete control over the shares:—

Held, by Finlay J., affirming the Commissioners, that as regards the two blocks of 40,000 shares and 14,000 shares respectively which had been renounced by the allottees thereof there had been no issue of them to the shareholders of the old company, and that consequently one of the conditions for exemption from stamp duty laid down in s. 55, sub-s. 1 (*c*) (i), of the Finance Act, 1927, had not been complied with, and therefore the instruments were subject to ad valorem stamp duty.

Held, by the Court of Appeal (affirming Finlay J.'s decision, but taking into account only the 40,000 shares renounced in favour of purchasers), that having regard to the underlying intention of s. 55 of the Finance Act, 1927, to give exemption in the case of a reconstruction from ad valorem stamp duty only when the new company was merely the old company in a new form, the allotment letter with a form of renunciation upon it was not an "issue" of shares within the meaning of the condition of exemption from ad valorem stamp duty set out in s. 55, sub-s. 1 (*c*) (i).

Case stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891.

1. On May 27, 1929, an instrument was presented on behalf of Oswald Tillotson (1929), Ld., whose name had since been changed to Oswald Tillotson, Ld. (hereinafter called "the appellant company"), by their solicitors to the Commissioners of Inland Revenue under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable. The instrument in question (hereinafter called "the agreement for sale") was an agreement under seal dated May 22, 1929, and made between Oswald Tillotson, Ld. (hereinafter and in the agreement for sale called "the old company") and William Taylor the liquidator thereof of the one part, and the appellant company of the other part, and was an agreement for sale to the appellant company by the old company of all its undertaking and assets for the consideration therein mentioned. A copy of the agreement for sale was attached to the case (Exhibit A) and was referred to as part of the case. The duty on the agreement for sale was assessed as hereinafter mentioned on June 24, 1929.

2. On August 19, 1929, five separate conveyances or assignments of certain of the properties agreed to be sold made by the old company and its liquidator to the appellant

company in pursuance of the agreement for sale were presented on behalf of the appellant company by their solicitors to the Commissioners of Inland Revenue under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instruments were chargeable. Copies of the assignments or conveyances were attached to the case (Exhibits B, C, D, E and F) and were referred to as part of the case.

3. The old company was incorporated under the Companies Acts, 1908 and 1913, as a private company on January 19, 1914, with a nominal capital of 8000*l.* divided into shares of 1*l.* each. Its capital was in December, 1927, increased to 40,000*l.*, divided into 40,000 shares of 1*l.* each, of which 23,672 had been issued and were fully paid.

4. At extraordinary general meetings of the old company, held respectively on April 25, 1929, and May 11, 1929, the following resolutions were duly passed and confirmed as special resolutions—namely :—

" 1. That it is desirable to reconstruct this company and accordingly that this company be wound up voluntarily and that William Taylor of 3 Grimshaw Street, Burnley, in the County of Lancaster, be hereby appointed liquidator for the purposes of such winding-up.

" 2. That the said liquidator be hereby authorized to consent to the registration of a new company to be named Oswald Tillotson (1929) Limited or some similar name with a Memorandum and Articles of Association which have already been prepared with the privity and approval of the directors of this company.

" 3. That the draft agreement submitted to this meeting and expressed to be made between this company and its liquidator of the one part and the said new company of the other part be hereby approved and that this company and its said liquidator be hereby authorized pursuant to article 111 of the Articles of Association of this company and to s. 192 of the Companies (Consolidation) Act, 1908, to enter into an agreement with such new company (when incorporated) in the terms of the said draft and to carry the same into effect with such (if any) modification as he thinks expedient."

5. By a special resolution of the old company, duly confirmed on May 11, 1929, Mr. William Taylor was appointed liquidator of the old company.

6. The appellant company was incorporated under the Companies Acts, 1908 to 1917, on May 17, 1929, with a nominal capital of 150,000*l.* divided into 600,000 shares of 5*s.* each. One of its objects as disclosed by its Memorandum of Association was to enter into and carry into effect with or without modification the agreement mentioned in clause 3 of the Articles of Association (being the agreement for sale) for the acquisition of the undertaking and assets of the old company.

7. On May 22, 1929, the agreement for sale was entered into, and by that agreement the old company and its liquidator agreed to sell its undertaking and assets to the appellant company. It was therein provided that as part of the consideration for the sale the appellant company should :—

> (A.) Pay, satisfy, discharge, perform and fulfil all the debts, liabilities, contracts, engagements and obligations of the old company as on the date of sale.
>
> (B.) Pay certain costs and keep the old company and its contributories and the liquidator indemnified in respect thereof ;

and as the balance of the consideration for the sale the appellant company was to allot to the nominees of the liquidator 340,000 fully paid shares of 5*s.* each in the capital of the appellant company to the intent that such shares might be distributed among the members of the old company as nearly as might be in accordance with their rights and interests as members of the old company.

8. Pursuant to the terms of the agreement for sale the liquidator of the old company nominated John O. Tillotson, T. E. Rhodes and David Coleman, who were shareholders in the old company, as the persons to whom the 340,000 shares

of the appellant company referred to in clause 3 of the agreement for sale were to be allotted as follows:—

To Mr. John O. Tillotson . . .	270,628	shares.
To Mr. T. E. Rhodes . . .	13,888	,,
To Mr. David Coleman . . .	55,484	,,
	340,000	,,

9. The appellant company sent an allotment letter to each of the said shareholders in the old company for the said shares of the appellant company so directed to be allotted to him. A specimen copy of the allotment letter with form of renunciation attached was annexed to the case (Exhibit G) and was referred to as part of the case.

10. The duty on the agreement for sale was assessed by the Commissioners at 10*s*. on June 24, 1929. Annexed to the case (Exhibit H) was a copy of the notice of assessment sent on that day to the solicitors for the appellant company. The duty of 10*s*. was paid and the agreement for sale so stamped. The adjudication stamp was impressed on the agreement for sale on July 9, 1929, and the agreement subsequently filed with the Registrar of Joint Stock Companies.

11. In June, 1929, Mr. Tillotson sold 40,000 of the shares so directed to be allotted to him as aforesaid, and in the same month Mr. David Coleman requested the appellant company to register certain of his relatives as holders in the aggregate of 14,400 shares of the 55,484 shares so directed to be allotted to him as aforesaid, and these 40,000 shares and 14,400 shares were renounced by Mr. Tillotson and Mr. Coleman respectively in favour of persons who were not shareholders in the old company. The Commissioners were subsequently (in August, 1930) informed that these relatives of Mr. Coleman were from the date of the renunciation to hold the 14,400 shares mentioned above in trust for him. Mr. Rhodes did not deal with any part of his shares in any way.

12. The secretary of the appellant company accordingly, instead of entering Messrs. J. O. Tillotson, T. E. Rhodes and David Coleman in the register of members of the appellant

company as the original holders of the said 340,000 shares, made the following entries of original holders of the said 340,000 shares in the register of the appellant company :—

Mr. John O. Tillotson	230,628
The parties being purchasers or sub-purchasers of the said 40,000 shares .	40,000
Mr. T. E. Rhodes	13,888
Mr. David Coleman	41,084
Mr. Ronald Coleman	4,800
Mr. Walter Coleman	4,800
Miss Gwendoline Coleman . . .	4,800
	340,000

13. By reason of the facts hereinbefore mentioned the first registered holders in the books of the appellant company of the shares of the appellant company which formed part of the consideration for the sale to the appellant company under the agreement for sale were, to an extent exceeding 10 per cent. of such shares and exceeding 10 per cent. of the amount or value of the total consideration for the sale (except such part thereof as consisted in the transfer to or discharge by the appellant company of liabilities of the old company), persons who were not holders of shares in the old company.

14. When the conveyances or assignments referred to in para. 2 of the case were subsequently presented for adjudication of stamp duty the Commissioners intimated to the solicitors for the appellant company that before exemption from ad valorem duty could be granted on the assignments and conveyance it would be necessary for the Commissioners to be satisfied that the conditions of sub-s. 1 (*c*) (i) of s. 55 of the Finance Act, 1927 (1), had been complied with. The appellant company contended that all the conditions of s. 55 of the Finance Act, 1927, had been complied with and that the exemption from ad valorem duty applied.

15. The Commissioners were of opinion that in the circumstances hereinbefore detailed the conditions referred to had

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(1) See post, p. 158 [*Brotex* case].

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not been complied with, and they accordingly, on April 21, 1931, assessed the conveyance and assignments and re-assessed the agreement for sale to ad valorem duty with interest. A copy of the notice of assessment (Exhibit J) sent on that date to the solicitors for the appellant company was annexed to the case and was referred to as part of the case.

16. On May 4, 1931, the solicitors to the appellant company paid the ad valorem duty and interest in accordance with the notice of assessment last mentioned, amounting together to 1102*l.* 9*s.* 9*d.* The agreement for sale (which was filed on the appellant company's file with the Registrar of Joint Stock Companies) was restamped by the Commissioners of Inland Revenue with the duty of 516*l.* 10*s.*, and with a stamp denoting that 47*l.* 12*s.* interest had been paid, the assignment of goodwill, etc., was stamped with a stamp indicating that it had been adjudged not liable to duty, and also with a stamp indicating that ad valorem duty of 516*l.* 10*s.* had been paid, and each of the other conveyances and assignments was stamped with ad valorem duty and interest and the adjudication stamp impressed as shown in the copies annexed to the case.

17. The appellant company, being dissatisfied with the assessment made and having paid the duty in accordance therewith, required the Commissioners to state and sign a case under s. 13 of the Stamp Act, 1891. A copy of the notice requiring a case was annexed to the case (Exhibit K). The Commissioners stated and signed this case accordingly.

18. Since the date of the said notice the Commissioners had been advised that in the circumstances hereinbefore detailed no interest was payable by the appellant company, and they had repaid the interest paid as aforesaid, amounting in all (including the said sum of 47*l.* 12*s.*) to a total sum of 87*l.* 19*s.* 9*d.*

The question for the opinion of the Court was: Whether the agreement for sale and subsequent conveyances or assignments were liable to ad valorem duty as assessed by the Commissioners or whether they were exempt from such duty?

"LETTER OF ALLOTMENT.
OSWALD TILLOTSON (1929), LIMITED
(Incorporated under the Companies Acts, 1908 to 1917).

Share Capital, 150,000*l.*
divided into
600,000 Ordinary Shares of 5*s.* each, numbered 1 to 600,000.

Transfer Office,
Pinners Hall, Austin Friars,
London, E.C. 2.
27th May, 1929.

Dear Sir (or Madam),

I am directed to inform you that in response to your application the directors have allotted you . . . . Ordinary Shares of 5*s.* each fully paid (numbered . . . . to . . . . inclusive) in accordance with the Memorandum and Articles of Association of the company.

Yours truly,
John W. Bland,
London Secretary.

Please note carefully the following instructions regarding Renunciation and Registration.

A form of renunciation to a nominee of the right to registration is provided on the back hereof.

Letters of allotment will be split on application once only (after renunciation) up to 24th July, 1929, and renounced letters of allotment must be lodged for registration in accordance with the instructions on the back hereof, on or before the 31st July, 1929.

. . . .

LETTER OF RENUNCIATION.

Available only up to 31st July, 1929.

To the Directors of Oswald Tillotson (1929), Limited.

I/We hereby renounce my/our right to the within mentioned allotment of shares and request you to register such shares in favour of the under mentioned nominee.

Signature/s of Person/s renouncing the shares. . . . .

Stamp.

Date.................1929" . . . .

Topham K.C. and *Wynn Parry* for the appellant company. The question in this case arises on the reconstruction of a company into the appellant company and turns upon whether the consideration for the acquisition of the undertaking of the old company was the issue of shares in the appellant company to the holders of shares in the old company. There was an allotment of shares in the appellant company to the holders of shares in the old company by letters of allotment accompanied by a form for renunciation. One of the shareholders sold a number of the shares allotted to him and renounced those shares in favour of persons who were not shareholders of the old company. The condition in s. 55, sub-s. 1 (*c*) (i.), of the Finance Act, 1927, was complied with as soon as the letters of allotment were sent to the shareholders of the old company; there was then an issue of shares in the new company to the holders of shares in the old company notwithstanding that the names of those shareholders had not been registered in the books of the appellant company, and that there had been a transfer of the shares to persons who were not shareholders in the old company before the registration took place. The question turns upon what is meant by an "issue" of shares. It is stated in Buckley on Companies, 11th ed., p. 96, that "It was supposed to have been decided in *Bush's Case*(1) that by the 'issue' of shares was meant the issue of the certificates for the shares. But this is a misapprehension. It is not necessarily either the allotment of the share or the issue of the certificate that constitutes the issue of the share. The question is whether the shareholder has or not been put completely in possession of his share, and this may be so, although some formal act may not have been completed." Where a letter of allotment has been sent the shareholder to whom the letter has been sent has the right to be put on the register. The position of a person who has taken shares in a company under a renunciation on the back of an allotment letter was considered by the Court of Appeal in *Collins* v. *Associated Greyhound Racecourses, Ld.* (1) In that case a number of shares in a company were allotted to M. and O. The allotment letter had on its back a form of renunciation, and M. and O. renounced the shares in favour of C. Lord Hanworth M.R. said (2): "It appears to me, when this allotment letter is examined, that it shows a contract between the company" and M. and O. "to place them on the register and issue a certificate for shares when the full sums are paid. The right which they have, is a right to certain shares. The contract appears to be complete between the company" and M. and O., "a contract the fruit of which is shares." In *In re Multidoor, Ld.* (3), Maugham J. held that a person who had received an allotment of shares, but who had renounced them, could nevertheless be put on the register of shareholders. These cases show that the allottee of shares is entitled to claim to be put on the register, and also that a company is entitled to put an allottee of shares upon the register notwithstanding that he has signed a form of renunciation which the company has not accepted. When the shareholder signed the form of renunciation he ratified what had been done by the liquidator on his behalf. The shareholder had an equitable right to the shares from the time when the letter of allotment was sent to him. The headnote in *Bush's Case* (4) states that certain "shares were not issued within the meaning of the Companies Act, 1867 (30 & 31 Vict. c. 131), s. 25, until the certificate was issued,"

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(1) (1874) L. R. 9 Ch. 554.

(1) [1930] 1 Ch. 1.
(2) Ibid. 33.
(3) Unreported. February 2, 1931.
(4) L. R. 9 Ch. 554.

but that headnote was stated in *Blyth's Case* (1) to be a blunder. It was there held that "the issue of the certificate is not necessary to the issue of shares." The title of the shareholder is complete without the issue of the certificate. In *Clarke's Case* (2) shares were held not to be considered as issued before the registration of the contract, and they were to be treated as fully paid up. In *Pool's Case* (3) a contract for the issue of shares as fully paid up was given to the allottee late in the day for the purpose of his getting it filed. At the same time a certificate for the shares was handed to him. The contract was filed on the following morning. It was held that the contract was filed at the time of the issue of the shares. In *Dalton Time Lock Co.* v. *Dalton* (4) a share, which under an agreement was issued to the vendors as fully paid, was allotted and issued to the defendant as the share for which he had subscribed the Memorandum of Association. It was held that the share was issued to him immediately upon the registration of the company and that he was liable to pay cash therefor. The cases all show that when a person is in control of the shares in the sense that he is equitably entitled to the shares, there has been an issue of those shares to him notwithstanding that he may not have been registered. In the present case there was an allotment of shares in the new company to shareholders of the existing company, and that was the consideration for the acquisition by the new company of the undertaking of the existing company, and the fact that some of those shareholders transferred their shares to persons who were not shareholders of the existing company does not take away their rights. Sect. 55 of the Finance Act, 1927, is a special provision in favour of a company which is being reconstructed or which is absorbing another company, and if the shares in that company have been issued to the shareholders of the old company as consideration for the acquisition of the undertaking of the old company, in the sense that those shareholders have been put in complete control of those shares there has

(1) (1876) 4 Ch. D. 140.
(2) (1878) 8 Ch. D. 635.
(3) (1887) 35 Ch. D. 579.
(4) (1892) 66 L. T. 704.

been an "issue" of the shares to them within the meaning of the section, and it is immaterial what the shareholders do with the shares so allotted to them.

Sir Boyd Merriman S.-G. and *J. H. Stamp* for the Crown. In a normal case the entry of a person's name as a shareholder on the register of a company in respect of shares purported to have been allotted to him constitutes the issue of those shares in that company to him. In *Bush's Case* (1) the issue of the certificate was merely taken as evidence of the time when the shares were issued, but it is clear from *Blyth's Case* (2), where exception was taken to the headnote in *Bush's Case* (1), that *Bush's Case* (1) must not be taken to mean that shares are only issued when the certificates are issued. The material question, as is shown in *Clarke's Case* (3), is when did the name of the shareholder get on the register of shareholders? It is true that when there has been an allotment of shares in a company the allottee can obtain specific performance of the contract by the company to allot those shares to him, and that the company can insist upon putting his name upon the register notwithstanding that he has signed a form of renunciation which has not been assented to by the company. That, however, is not sufficient to satisfy the requirements of s. 55 of the Finance Act, 1927. The intention of the legislature in enacting that section was to exempt a company from stamp duty when it could be shown that that company was being substituted for another company with substantially the same shareholders. In order to obtain the exemption from stamp duty the shares in the transferee company must actually be issued to the existing company or to the holders of shares in the existing company to the extent of 90 per cent. "Issue of shares" in the transferee company means entry of the name of the person to whom the shares are issued in the register of the transferee company. Up to that time there has been no issue of shares within the meaning of s. 55, even though what has been done may give the person to whom the letter

(1) L. R. 9 Ch. 554.
(2) 4 Ch. D. 140.
(3) 8 Ch. D. 635.

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of allotment has been sent a right to specific performance by the company of the contract to allot those shares to him. In order to come within the terms of the section the shares must be in the legal ownership of the persons to whom they are issued, the fact that certain persons may have by reason of the allotment letter an equitable right to shares is not sufficient. Stirling J. in *Spitzel* v. *Chinese Corporation, Ld.*, said (1): "What is an allotment of shares? Broadly speaking, it is an appropriation by the directors or the managing body of the company of shares to a particular person. The legal effect of the appropriation depends on circumstances. Thus it may be an offer of shares to the allottee, or it may be an acceptance of an application for shares by the allottee; but of itself an allotment does not necessarily create the status of membership." In *Mosely* v. *Koffyfontein Mines, Ld.* (2), Cozens-Hardy M.R. said (3): "Now the issue of shares is something quite distinct from allotment." And Farwell L.J. said (4): "It is plain that the words 'creation,' 'issue,' and 'allotment' are used with the three different meanings familiar to business people as well as to lawyers. There are three steps with regard to new capital." "Allotment" is one of the essential steps in the issue of capital, whereas "issue" is the whole process. An "issue of shares" is only complete when the name of the shareholder has been put on the register. Unless the list of shareholders in the new company were substantially the same as the list of shareholders in the old company there would be great practical difficulty in carrying out s. 55 of the Act of 1927. Rowlatt J. had a very similar, although not exactly the same, point before him in *Brotex Cellulose Fibres, Ld.* v. *Inland Revenue Commissioners* (5), and the principle upon which Rowlatt J. proceeded in that case is directly in favour of the Crown here. Rowlatt J. purported to follow that decision in the subsequent case of *Murex, Ld.* v. *Inland Revenue Commissioners.* (6)

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(1) (1899) 80 L. T. 347, 351.
(2) [1911] 1 Ch. 73.
(3) Ibid. 80.
(4) [1911] 1 Ch. 84.
(5) Post, p. 158.
(6) Post, p. 173.

Topham K.C. in reply. In *Murex, Ld.* v. *Inland Revenue Commissioners* (1) the great bulk of the shares in the new company were, at the request of the liquidator of the old company, allotted to nominees and not to the shareholders of the old company at the time it was wound up. That case does not deal with the question when shares are issued. In *Brotex Cellulose Fibres, Ld.* v. *Inland Revenue Commissioners* (2) also shares in the new company were at the request of the old company allotted to persons who were not shareholders of the old company. *Mosely* v. *Koffyfontein Mines, Ld.* (3), has really no bearing upon the present case. Farwell L.J. there said that the issue of capital of a company may take place before allotment. There is nothing in the Companies Acts to support the contention that there cannot be an issue of shares unless the shareholders have the legal ownership in the shares. As soon as there is an enforceable contract by the sending of an allotment letter the shareholder has control of his shares. Sect. 68 of the Companies Act, 1929, merely says that "A certificate, under the common seal of the company, specifying any shares held by any member, shall be prima facie evidence of the title of the member to the shares." In *Bush's Case* (4) the issue of the certificate was treated as evidence that the shares had left the control of the company. In other words that the shareholder had acquired control of the shares. If the list of the shareholders in the old company be compared with the list of allotments in the new company they will be found to agree. The fact that a person who received an allotment in the new company sold some of the shares in June before registration is immaterial.

June 10. FINLAY J. This case, in which I have now to give judgment, depends upon the construction of s. 55, sub-s. 1 (*c*) (i.), of the Finance Act, 1927. The sub-section is this: "If in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any

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(1) Post, p. 173.
2) Post, p. 158.
(3) [1911] 1 Ch. 73.
(4) L. R. 9 Ch. 554.

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companies it is shown to the satisfaction of the Commissioners of Inland Revenue that there exist the following conditions, that is to say—(*a*) that a company with limited liability is to be registered, or that since the commencement of this Act a company has been incorporated by letters patent or Act of Parliament, or the nominal share capital of a company has been increased; (*b*) that the company (in this section referred to as 'the transferee company') is to be registered or has been incorporated or has increased its capital with a view to the acquisition either of the undertaking of, or of not less than ninety per cent. of the issued share capital of, any particular existing company; (*c*) that the consideration for the acquisition (except such part thereof as consists in the transfer to or discharge by the transferee company of liabilities of the existing company) consists as to not less than ninety per cent. thereof—(i.) where an undertaking is to be acquired, in the issue of shares inthe transferee company to the existing company or to holders of shares in the existing company." In such a case not less than 90 per cent. of the consideration for the acquisition of the undertaking of the existing company is to consist in the issue of shares in the transferee company to the existing company or to the holders of shares in the existing company. The only other sub-section which appears to be material on this point is sub-s. 6, which says by sub-head (*b*) that where shares in the transferee company have been issued to the existing company in consideration of the acquisition, those shares must not be parted with by the existing company for a period of two years.

The facts are set out in the case and, subject to the one point raised, there is no doubt that the conditions were fulfilled necessary to bring the section into operation. The company in question is a company called Oswald Tillotson, Ld. That company was formed to acquire the business of the old company, as it may be called, which was being wound up voluntarily. An agreement of sale in the usual way was entered into. The substance of the agreement is set out in para. 7 of the case. By it the old company and its liquidator agreed to sell its undertaking and assets to the appellant company; and as part of the consideration therefor the appellant company was to pay and discharge the debts and liabilities of the old company, to pay certain costs, and as to the balance of the consideration for the sale, the appellant company was to allot to the nominees of the liquidator 340,000 fully-paid shares of 5*s.* each in the capital of the appellant company to the intent that such shares might be distributed among the members of the old company as nearly as might be in accordance with their rights and interests as members of the old company. Pursuant to that, as is found in para. 8 of the case, the liquidator of the old company nominated three gentlemen, Mr. John O. Tillotson, Mr. T. E. Rhodes, and Mr. David Coleman, who were shareholders in the old company, as the persons to whom the 340,000 shares above referred to were to be allotted. He nominated Mr. Tillotson to have 270,628 shares allotted to him, Mr. Rhodes to have 13,888 shares allotted to him, and Mr. Coleman to have 55,484 shares allotted to him, making up the whole 340,000 shares. Upon that the appellant company sent an allotment letter to each of these gentlemen, and that allotment letter was accompanied by a form of renunciation. What happened was this: In June, 1929, Mr. Tillotson, one of these three gentlemen, sold 40,000 of the shares directed to be allotted to him, and in the same month Mr. David Coleman, another of these gentlemen, requested the appellant company to register certain of his relatives as holders in the aggregate of 14,400 of the shares directed to be allotted to him. Then these two gentlemen, Mr. Tillotson and Mr. Coleman, renounced in favour of the persons to whom they had sold the shares or whom they desired might be registered as shareholders. Those persons were not shareholders in the old company. The result, of course, was that instead of Mr. Tillotson, Mr. Rhodes and Mr. Coleman being simply entered in the register of members, entries were made accounting for the whole 340,000 shares, but showing that as to the shares which had been sold by Mr. Tillotson or the shares which Mr. Coleman had desired might be registered in other names, those shares had been entered as belonging,

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not to Mr. Tillotson and to Mr. Coleman, but to the persons who they had desired should be entered on the register in respect of those shares and in whose favour they had executed the letters of renunciation. The whole question turns upon whether in these circumstances the shares were "issued" to these three gentlemen, Mr. Tillotson, Mr. Rhodes and Mr. Coleman. If they were not the section has not been complied with, because in that event shares in the transferee company would not have been issued to holders of shares in the existing company to the extent of 90 per cent. which is necessary.

My attention was called to a passage in Buckley on Companies, 11th ed., at p. 96, where the question of what is meant by an "issue" of shares is discussed. Several cases are there referred to, including *Bush's Case* (1) and *Blyth's Case.* (2) These decisions, it is curious to notice, are both decisions of judges of great eminence, and both appear to have given rise to considerable difficulty as to what exactly they meant. Another case which is also referred to in Buckley is *Attorney-General* v. *Regent's Canal and Dock Co.* (3) There is in that case a passage in the judgment of Cozens-Hardy L.J. which has some bearing upon the present case, although in my view these authorities are not really of very great value except as illustrating the sort of view which the Courts have taken. I think in construing a section of this sort one has to arrive at what the section itself means, and I rather doubt whether decisions upon other Acts of Parliament really help very much. What Cozens-Hardy L.J. said was this (4): "It is true that in certain cases no certificate by the company is necessary to constitute an issue, and *Heaton's Steel and Iron Co.* (5) was cited, but in that very case it was held that there was an issue of shares when the company had inserted the name of the shareholder on the register."

Now, the problem was put to me, in the very able arguments which were addressed to me, as being this: whether, in order to constitute an issue of shares it was sufficient that an equitable title was thereby conferred, or whether it was necessary that the person should have the legal title to the shares. I said a few moments ago that I thought it was important to look at the section and see what its object was and what it was dealing with. It is clear enough what this section is dealing with; it is dealing with what was, I suppose, conceived to be a hardship where there was a transfer of property from one legal entity to another legal entity, but where the transfer was of a rather technical character, because in substance, looked at broadly, the ownership remained the same. That, I think, is reasonably clear from the section itself; it is clear from the provisions with regard to the issue of shares to the shareholders in the old company, and it is also made clear, I think, by sub-head *(b)* of sub-s. 6, where there is a provision imposing a check upon the right of the old company, where the shares are issued to it, to part with the shares.

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(1) L. R. 9 Ch. 554.
(2) 4 Ch. D. 140.
(3) [1904] 1 K. B. 263.
(4) Ibid. 270.
(5) 4 Ch. D. 140 (*Blyth's Case*).

I think that the question really turns upon what is the correct view of the effect of the letter of allotment with the letter of renunciation which was attached to it. It is, I suppose, a very common form; it is simply this: "I am directed to inform you that in response to your application the directors have allotted you . . . . Ordinary shares of 5*s.* each fully paid . . . . in accordance with the Memorandum and Articles of Association." Then: "A form of renunciation to a nominee of the right to registration is provided on the back hereof"; and then there are certain provisions with regard to the splitting of the letter of allotment. On the back there is the letter of renunciation, which is in these terms: "I/We hereby renounce my/our right to the within-mentioned allotment of shares and request you to register such shares in favour of the under mentioned nominee," and that has to be signed by the person/s renouncing the shares. I think the point is, what does that really mean? I think what the company are there saying to the shareholders is this: "You are entitled to shares; do you want them or do you prefer that somebody else should have them; the shares are not issued yet, but you are entitled to have shares issued to you. Do you want them issued to you? If you do they will be issued to you. Do you want them issued to you or would you like us instead to issue them to somebody else?" That, I think, is the substance of the transaction, and that, I think, is what is expressed in the letter of allotment coupled with the letter of renunciation. Now, if that is right it seems to me that the answer to the case must be that, if the shareholder who has a right to have the shares issued to him, or has an equitable title to the shares, says: "No, I will not have them issued to me, I want them to be issued to A. B. instead," then there is no issue to the shareholder, but there is an issue to A. B. That seems to me to be the result. If that is right it is not necessary to go into the somewhat perplexed questions whether, in order to constitute an issue, there must be a registration or a certificate or both, whether either is necessary, whether one will do without the other, or any of these matters which have arisen in the various cases. Here I think the whole thing can be decided on this broad view, that as to the particular shares which I am dealing with, there was no issue to the old shareholders, because the old shareholders desired that, instead of the issue being to them, the issue should be to somebody else. I think that that is the real substance of this transaction, and it seems to me that if anybody asked: "To whom have these shares been issued?" the answer would have been: "They have been issued as to the bulk of them to the old shareholders, but as to the particular blocks of shares with which we are dealing they have been issued not to the old shareholders, but to certain nominees of the old shareholders, whom the old shareholders wished to have the shares instead of themselves." If that is right, it of course follows, although I think the case one of hardship, that the company failed to fulfil one of the conditions of the section. The Commissioners of Inland Revenue, to whom these matters are referred, decided that the company failed to bring themselves within the section. I think, for the reasons that I have tried to express, that the Commissioners arrived at a correct conclusion. It accordingly follows that this appeal must be dismissed.

Appeal dismissed.

R. F. S.

The new company appealed. The appeal was heard on July 21, 1932.

Topham K.C. and *Wynn Parry* for the appellant company.

Sir Boyd Merriman S.-G. and *J. H. Stamp* for the Crown.

[The following additional cases were referred to: *Levy* v. *Abercorris Slate and Slab Co.* (1) and *In re Smith.* (2)]

Lord Hanworth M.R. This is an appeal by Oswald Tillotson, Ld., against a judgment of Finlay J., who held that the company had lost the relief granted to it from stamp duty by virtue of s. 55 of the Finance Act, 1927.

I need refer to very few of the facts, which are stated in the case. There was an older company which, as explained in para. 4 of the case, determined at an extraordinary general meeting in April, 1929, by resolutions which were confirmed on May 11, 1929, to reconstruct. The way in which it was to be reconstructed was by a sale to a new company, and on May 22, 1929, an agreement for sale was entered into. By that agreement the old company and its liquidator agreed to sell its undertaking and assets to the appellant company. That it was enabled to do by virtue of s. 192 of the Companies (Consolidation) Act, 1908, now s. 234 of the Companies Act, 1929. The plan which was adopted was one which could properly be carried out, but by the terms of the section giving that authority some dissentient shareholders might claim to stand apart from the sale to the new company, and require the liquidator to purchase their shares at a value to be determined by arbitration.

If the appellant company were an entirely new company it would have to pay stamp duty on its capital, but as

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(1) (1887) 37 Ch. D. 260.

(2) [1902] 2 Ch. 667.

I read s. 55 of the Finance Act, 1927, where there is merely an amalgamation or a reconstruction, so that in substance stamp duty has already been paid on the share capital, you are not to exact from the company, which is the old company in a new form, a new stamp duty. There are, however, certain limitations provided for in the section; and there is also a warning in sub-s. 6 that even though the limitations laid down in the section have been complied with, yet if the conditions specified in sub-s. 1 are not fulfilled in the reconstruction as actually carried out, then the claim for exemption will fail. The company made a claim for exemption, and received a notice dated June 24, 1929, in which they were told that the instrument of transfer was subject to a duty of 10*s.* and no more; but inasmuch as some hardship has been suggested, it is worth while pointing out that in that same letter these words follow: "Attention is directed to sub-section (6.) (*a*) of section 55. It is pointed out that if the scheme as carried out does not fulfil the conditions imposed by sub-section (1.) of that section, exemption from conveyance on sale duty may be deemed not to have been allowed."

There were three shareholders of the old company, and 340,000 shares of the new company were allotted amongst them. Mr. John Tillotson sold 40,000 of the shares allotted to him; Mr. Rhodes sold none of his shares; and Mr. David Coleman put 14,400 of his shares into the names of nominees in trust for him. For the purpose of my judgment I leave those transfers to nominees aside, for some special argument might be put as regards them; but the result of Mr. Tillotson's sale of 40,000 shares was that new persons appeared as shareholders in the new company, persons who held 40,000 of the shares lately belonging to Mr. Tillotson; and it is argued that by reason of those transfers carried out by means of a renunciation form appearing on the allotment letter it cannot be said that the terms of sub-s. 1 (*c*) of s. 55 were carried out. Those terms are "that the consideration for the acquisition . . . . consists as to not less than ninety per cent. thereof—(i) where an undertaking is to be acquired, in the issue of shares in the transferee company to the existing company or to holders of shares in the existing company."

What then is the meaning of the word "issue" in the phrase "in the issue of shares in the transferee company"? What happened here was that a letter of allotment was issued to the transferor, accompanied by a form of renunciation. That right of renunciation was exercised, with the result that the purchasers from Mr. Tillotson were registered as the holders of 40,000 of the new shares. It is said that inasmuch as the ultimate destination of those shares was determined by the volition of Mr. Tillotson, the shares had been issued to the holders of shares in the existing company, and that the Court ought not to look beyond that and see whether or not the destination of the shares was to persons other than holders in the existing company. I have come to the conclusion, after considering a great number of cases which have been brought to our attention, rightly enough, by Mr. Topham, that it is impossible to say that the word "issue" is used in all Acts of Parliament and in all circumstances with the same meaning. I think that an illustration of the divergence in its meaning is to be found by looking at *Clarke's Case* (1) and contrasting it with the observations made in *Mosely* v. *Koffyfontein Mines, Ld.* (2), by the Master of the Rolls. It is obvious that different meanings may be attributed to the word "issue" according to the circumstances of the particular case under consideration; but in *Clarke's Case* (1), which went to the Court of Appeal, it is quite obvious that both the Lord Chief Justice (Sir Alexander Cockburn) and Cotton L.J. really thought of the word "issue" as something distinct from allotment, and as importing some subsequent act whereby the title of the allottee became complete.

When I come to consider the purpose of this section, and to see why there is to be immunity and exemption from transfer stamp duty, I find that it is because the old company is really represented or replaced by the new company, and

(1) 8 Ch. D. 635.

(2) [1911] 1 Ch. 73, 80.

the shareholders in the new company are to be in substance the shareholders of the old company. It is because there has been not an out-and-out transfer for cash but merely a reconstitution of the same corporators in a new company. Bearing that principle in mind, and realizing that the test is to see whether or not there is a real identity as to not less than 90 per cent. of the shareholders, I come to the conclusion that the meaning of the word "issue" is something more than the mere giving of an allotment letter to an old shareholder enabling him to deal with the shares offered to him at his volition. It must connote, as indicated by Sir Alexander Cockburn, a later stage; and the test has to be applied whether the shares ultimately belong to some person who was the holder of shares in the old company, so that the identity of the old corporators and the new corporators is maintained.

For these reasons I think that Finlay J. was right. The appeal must be dismissed with costs.

SLESSER L.J. I agree, and have only one further observation to make. Sect. 55, sub-s. 1 (*c*), deals with a transference from the transferor company to the transferee company, or to the persons who were the holders of shares in the transferor company. In the case of a transfer from company to company, as was pointed out by the Solicitor-General, by sub-s. 6 (*b*) it is provided that where shares in the transferee company have been issued to the existing company in consideration of the acquisition, and the existing company, within a period of two years, ceases to be the beneficial owner of the shares so issued to it, the privileges do not apply. In the case of an individual shareholder there is no such limitation of time. When once any individual shareholder has become a registered shareholder in the new company he can dispose of his shares, like any other shareholder, as he thinks fit; but the words of sub-s. 6 (*b*), speaking of the new company being "the beneficial owner of the shares so issued to it," seem to me to be valuable in construing the word "issue" when applied to a shareholder equally with a company. I think there is contemplated in both cases a continuity of personality and that the word " issue " means such an issue as effectually makes the shareholder in the new company a beneficial owner and not merely a person with an equitable right to call upon the company subsequently to register him as a beneficial owner, as would be the case if the mere allotment in itself, accompanied by a form of renunciation, were to be the same as " issue."

ROMER L.J. I agree. I cannot read this section without seeing that, whatever the word " issue " may mean in other collocations, here it is equivalent to the creation of a registered shareholder ; that is to say, that by the issue of the shares to the shareholders of the old company is meant that which makes the shareholders in the old company become shareholders in the new company. It is quite clear, looking at the section, that the benefit of it was intended to be conferred only upon a company which really was the old company in a new form—which substantially was that company, although it was a different legal entity. The restriction put upon the sale by an old company of shares allotted to it points strongly in that direction, and although, when the shares are issued directly to the shareholders of the old company, it is impossible to prevent those shareholders from exercising their rights of transferring the shares, the section was not intended to give relief in a case like the present, where shareholders of the old company, instead of becoming shareholders in the new company, are expressly given, by the letters of allotment, the power of not becoming members, but of selling their shares to other people, who so become members in their stead.

For these reasons it appears to me that the decision of Finlay J. was right, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Ashurst, Morris, Crisp & Co.; Solicitor of Inland Revenue.*

H. C. G.

1930
Dec. 16, 17.

BROTEX CELLULOSE FIBRES, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp Duty—" Conveyance or Transfer on Sale "—Claim for Exemption—Reconstruction of Company—Consideration for Acquisition—Issue of Shares in Transferee Company—Issue to Holders of Shares in existing Company or to their Nominees—Majority of Shares in existing Company held by bare Trustees—Shares issued to Nominees exceeded 10 *per cent. of Consideration—Stamp Act,* 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 1, 59 *; First Schedule—Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 55.

A new company was formed for the purpose of acquiring from the " B " company its property and assets. An agreement for sale was entered into on October 22, 1928, by which the " B " company agreed to sell and the new company agreed to purchase all the undertaking and assets of the " B " company, the consideration being the allotment to the liquidator of the " B " company or his nominees of 600,000 preference shares of the new company of 1*l.* each fully paid and 3,600,000 ordinary shares of the new company of 1*s.* each fully paid. On November 22, 1928, the appointment of the liquidator was confirmed, and he adopted the agreement for sale. On October 22 about 26 shareholders in the " B " company held the whole of the 120,000 shares in that company. On November 22, 88,000 shares out of those 120,000 shares were held by the solicitors of the " B " company as bare trustees for the transferors, who were, as to 45,500 shares, eight shareholders, and as to 42,500 shares, the purchaser of those shares from seven shareholders in the " B " company. Shares in the new company were allotted to the registered holders of 11,200 shares of the " B " company in respect of those shares. The holders of the remaining 108,800 shares of the " B " company requested the liquidator of the " B " company to procure the allotment of the shares in the new company to which they were entitled to persons other than themselves, and the shares were so allotted by the new company. In the case of a considerable number of shares, exceeding 10 per cent. of the total consideration for sale to the new company under the agreement for sale, they were allotted to persons who had agreed to purchase either shares of the " B " company or shares of the new company to which registered holders of shares in the " B " company were entitled. As a consequence the first registered holders of shares in the new company were to an extent far exceeding 10 per cent. of such shares, and far exceeding 10 per cent. of the total consideration for the sale, persons who were not holders of shares in the " B " company. The Commissioners of Inland Revenue held that the agreement for sale was liable to ad valorem duty under s. 59 of the Stamp Act, 1891 :—

Held, affirming the decision of the Commissioners of Inland Revenue, that the issue of shares to purchasers from, or other nominees of, holders of shares in the "B" company was not the issue of shares to holders of shares in the "B" company within the meaning of s. 55 of the Finance Act, 1927, and that therefore the new company were not entitled to exemption under that section.

Case stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891 (54 & 55 Vict. c. 39).

1. On November 19, 1928, an instrument was presented on behalf of Brotex Cellulose Fibres, Ld. (hereinafter called "the appellant company"), by their solicitors to the Commissioners of Inland Revenue under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable. The instrument in question (hereinafter called "the agreement for sale") was an agreement under seal dated October 22, 1928, and made between Brotex, Ld., of the first part, the appellant company of the second part, and Leonard Browning of the third part, and was an agreement for sale to the appellant company by Brotex, Ld., of all its undertaking and assets for the consideration therein mentioned. A copy of the agreement for sale was attached to the case (called Exhibit A) as part of the case.

2. The question for the consideration of the Court was whether the agreement for sale was liable to ad valorem stamp duty under or by reference to the heading "Conveyance or transfer on sale" in the First Schedule to the Stamp Act, 1891, and ss. 1 and 59 of that Act and other relevant statutory provisions, or whether the agreement for sale was exempt from such stamp duty by reason of s. 55 of the Finance Act, 1927. (1)

(1) Finance Act, 1927, s. 55, sub-s. 1: "If in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any companies it is shown to the satisfaction of the Commissioners of Inland Revenue that there exist the following conditions, that is to say—

(*a*) that a company with limited liability is to be registered, or that since the commencement of this Act a company has been incorporated by letters patent or Act of Parliament, or the nominal share capital of a company has been increased;

(*b*) that the company (in this section referred to as 'the transferee company') is to be registered or has been incorporated or has increased its

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3. Brotex, Ld., was incorporated under the Companies Acts, 1908 to 1917, on June 20, 1917, with a nominal capital of 6000*l.* divided into 120,000 shares of one shilling each. The appellant company was incorporated under the Companies Acts, 1908 to 1917, on September 13, 1928, with a nominal capital of 1000*l.* divided into 20,000 shares of one shilling each. By clause 3 of its articles of association it was provided that the appellant company was formed for the purpose of acquiring from Brotex, Ld., its property and assets upon the terms set forth in the draft agreement therein mentioned, being a draft of the agreement for sale.

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capital with a view to the acquisition either of the undertaking of, or of not less than ninety per cent. of the issued share capital of, any particular existing company;

(*c*) that the consideration for the acquisition (except such part thereof as consists in the transfer to or discharge by the transferee company of liabilities of the existing company) consists as to not less than ninety per cent. thereof—

- (i) where an undertaking is to be acquired, in the issue of shares in the transferee company to the existing company or to holders of shares in the existing company; or
- (ii) where shares are to be acquired, in the issue of shares in the transferee company to the holders of shares in the existing company in exchange for the shares held by them in the existing company;

then, subject to the provisions of this section,—

. . . . . .

(B) Stamp duty under the heading 'Conveyance or Transfer on Sale' in the First Schedule to the Stamp Act, 1891, shall not be chargeable on any instrument made for the purposes of or in connection with the transfer of the undertaking or shares, nor shall any such duty be chargeable under section twelve of the Finance Act, 1895, on a copy of any Act of Parliament, or on any instrument vesting, or relating to the vesting of, the undertaking or shares in the transferee company."

. . . . . .

Sub-s. 6: "If—

. . . . . .

(*b*) where shares in the transferee company have been issued to the existing company in consideration of the acquisition, the existing company within a period of two years from the date, as the case may be, of the registration or incorporation, or of the authority for the increase of the capital, of the transferee company ceases, otherwise than in consequence of reconstruction, amalgamation or liquidation, to be the beneficial owner of the shares so issued to it;

. . . . . .

the exemption shall be deemed not to have been allowed, and an amount equal to the duty remitted shall become payable forthwith. . . . ."

4. On October 22, 1928, the agreement for sale was entered into, and by that agreement, after reciting that it was intended that the capital of the appellant company should be forthwith increased to 1,000,000*l.*, divided into 750,000 preferred shares of 1*l.* each and 5,000,000 ordinary shares of one shilling each, and that the appellant company had been formed with a view (inter alia) of acquiring the whole of the undertaking and assets of Brotex, Ld., Brotex, Ld., agreed to sell and the appellant company agreed to purchase all the undertaking and assets of Brotex, Ld., as therein mentioned as from October 1, 1928. The consideration for the sale was to be :—

(*a*) The sum of 780,000*l.*, payable as to 600,000*l.* by the allotment to the liquidator of Brotex, Ld., or his nominees of 600,000 preferred shares of the appellant company of 1*l.* each fully paid, and as to 180,000*l.* by the allotment to the liquidator of Brotex, Ld., or his nominees of 3,600,000 ordinary shares of 1*s.* each in the appellant company fully paid, such preferred and ordinary shares to be distributable amongst the members of Brotex, Ld., subject to the provisions thereinafter contained in the proportion of five preferred shares and thirty ordinary shares for each share in Brotex, Ld., held by them respectively, and

(*b*) the payment by the appellant company to Brotex, Ld., of such a sum of cash as would enable Brotex, Ld., to satisfy its debts and liabilities outstanding on October 1, 1928, as therein mentioned, and

(*c*) such further sum of cash as would be necessary to enable the liquidator of Brotex, Ld., to pay the costs and expenses of and incidental to the liquidation of Brotex, Ld., and to satisfy dissentient members.

5. The agreement for sale was conditional upon certain resolutions of Brotex, Ld., being passed and confirmed to the effect :—

(1.) That Brotex, Ld., be wound up voluntarily, and

(2.) that the agreement for sale be approved, confirmed and adopted, and that the liquidator appointed in such voluntary winding-up to be authorized and directed to carry the same into effect, and was also conditional upon the appellant company passing the necessary resolution for the increase of the appellant company's capital in the manner aforesaid.

6. On November 7, 1928, the appellant company passed the following resolution in general meeting: —

"That for the purpose of acquiring the undertaking of Brotex, Limited, the directors be and they are hereby authorized to increase the capital of the company to 1,000,000*l.* by the creation of 750,000 preferred shares of 1*l.* each and 4,980,000 ordinary shares of one shilling each ranking pari passu with the existing shares in the company. The said preferred shares shall carry the following rights, namely, (A) as regards dividend the right to a fixed non-cumulative preferential dividend at the rate of 7½ per cent. per annum upon the capital for the time being paid up or credited as paid up thereon payable as regards each financial year exclusively out of the profits determined to be distributed in respect of such financial year and to 30 per cent. of the surplus profits which it shall be determined to distribute by way of dividend in respect of each financial year after payment of the said non-cumulative preferential dividend at the rate of 7½ per cent. per annum in respect of such year; (B) as regards capital the right in a liquidation to repayment of the capital paid up or credited as paid up thereon in priority to the ordinary shares and to 30 per cent. of the surplus assets remaining after repayment of the capital paid up on the ordinary shares but not to any further participation in profits or assets."

7. On November 7, 1928, the following resolutions of Brotex, Ld., were passed, and subsequently on November 22, 1928, confirmed as special resolutions of Brotex, Ld.:—

"(1.) That the company be wound up voluntarily and that John Claude Jardine Lonsdale of 10/11 New Burlington Street, London, W. 1, be and he is hereby appointed liquidator for the purposes of such winding-up.

"(2.) That the provisional agreement dated the 22nd day of October, 1928, and made between the company of the first part, Brotex Cellulose Fibres Limited of the second part and Leonard Browning of the third part be and is hereby approved, adopted and confirmed and that the liquidator of the company be and he is hereby authorized and directed to adopt the same and to carry the said agreement into effect pursuant to s. 192 of the Companies (Consolidation) Act, 1908, with such modification (if any) as he may deem necessary or expedient in the circumstances of the case."

8. On November 22, 1928, a resolution of the directors of the appellant company was passed whereby (in pursuance of the authority given to the directors by the resolution of the appellant company of November 7, 1928, hereinbefore referred to) it was resolved that the capital of the appellant company be increased by 999,000*l.*—namely, 750,000 preferred shares of 1*l.* each and 4,980,000 ordinary shares of 1*s.* each.

9. The agreement for sale was by an indorsed agreement dated November 22, 1928, and made between Brotex, Ld., of the first part, John Claude Jardine Lonsdale of the second part, the appellant company of the third part, and Leonard Browning of the fourth part (a copy whereof was annexed to the case, called Exhibit B, and might be referred to as part of the case), adopted by the said John Claude Jardine Lonsdale as liquidator of Brotex, Ld., and confirmed by the parties.

10. The following statement showed the names of the persons who held shares of Brotex, Ld. : (i.) at the date of the agreement for sale—namely, October 22, 1928 ; (ii.) at the date of the appointment of a liquidator and the execution of the adopting agreement—namely, November 22, 1928 :—

SHAREHOLDERS IN BROTEX, LD.

	On Oct. 22, 1928.	On Nov. 22, 1928.
Elia Ventura, 227 Graham Road, Hackney	3,000	—
Leonard Browning, 31 Ainger Road, Hampstead	14,000	2,000
Carried forward .	17,000	2,000

	On Oct, 22, 1928.	On Nov. 22, 1928.
Brought forward .	17,000	2,000
William Henry White, 107 Prospect Street, Waterbury, Conn., U.S.A.	2,000	—
Helen Seymour Eaton, Jules Hotel, Jermyn Street, London . .	3,000	3,000
Mary Elizabeth Hargreaves, 61 Evelyn Gardens, S.W. 7 . .	600	—
Herbert Buchanan Yuille, 31 Fenchurch Street, London . .	4,100	—
George Cursons, "Herne Brow," Herne Bay, Kent . . .	700	700
Martha Dye Appleton, Claridge's Hotel, Brook Street, W. . .	24,500	14,500
Mervyn Brown, 110 St. Martin's Lane, London	2,000	2,000
Doris Webb, 334/5 Moorgate Street Chambers, E.C. 2 . . .	22,000	—
William Herbert Appleton, Claridge's Hotel, Brook Street, W. . .	3,800	—
Formation Trust, 334/5 Moorgate Street Chambers, E.C. 2 . .	1,000	1,000
Thomas Graham, 11 Windsor Mansions, Northumberland Street, W.	200	—
Cuthbert Frederick Hargreaves, 2 Chesham Street, S.W. 1 . .	2,000	2,000
Mable Francis Black, Wallangra, Inverell, N.S.W. . . .	1,000	1,000
William James Bridger, 60 Chelverton Road, Putney, S.W. . . .	400	—
Charles James Moore Suckling, The Forge, Golders Green, N.W. 11 .	200	—
Katherine Elizabeth Brown, 11 Northumberland Avenue, W.C. 2 .	18,350	—
Carried forward .	102,850	26,200

	On Oct. 22, 1928.	On Nov. 22, 1928.
Brought forward .	102,850	26,200
John Claude Jardine Lonsdale, 42 Queen's Gardens, London, W.C. 2 .	50	—
Ruby Howard Hargreaves, 2 Chesham Street	4,400	4,400
John William Woodfield, 41 South Audley Street, London, W. 1 .	8,000	—
John Byng Paget, Ibstock Place, Clarence Lane, Roehampton .	2,000	—
John Graham Dixon, 14 Langton Avenue, Oakleigh Park, N. .	100	100
William Balfour Anderson, Pinners Hall, Austin Friars, E.C. 2 .	100	100
Colonel Allen Soames, "Vernons," Chappel, Essex . . .	2,000	—
Stella Mary Honor Cursons, "Herne Brow," Herne Bay, Kent . .	500	500
Maurice E. Turner, Robert R. J. Turner, William T. Cave, 115 Leadenhall Street, E.C. . .	—	88,100
Evelyn Charles Stanley, 29 Cornhill, London	—	200
Captain John Alexander Holder, "Keeping," Beaulieu, Hants .	—	400
	120,000	120,000

11. The differences in personnel between the holders of shares of Brotex, Ld., at the respective dates referred to in the preceding paragraph were accounted for by the following facts :—

(*a*) Between October 22, 1928, and November 7, 1928 (the date of the first meeting of Brotex, Ld., at which the resolution for the approval and confirmation of the agreement for sale was submitted to the shareholders), 45,600 shares of

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Brotex, Ld., were transferred to M. E. Turner, R. R. J. Turner and W. T. Cave to hold as bare trustees for the respective transferors, with instructions to vote for the resolution. They were so transferred in pursuance of an arrangement evidenced by letters in similar form signed by the respective holders of the shares in question (a specimen letter of which letters was annexed to the case and called Exhibit C).

Particulars of the shares so transferred were as follows :—

Transferors.	*Number of Shares.*
E. Ventura	3,000
L. Browning	12,000
M. E. Hargreaves	600
K. E. Brown	17,950
J. C. J. Lonsdale	50
J. W. Woodfield	8,000
J. B. Paget	2,000
A. Soames	2,000
	45,600

(*b*) On October 27, 1928, 42,500 shares of Brotex, Ld., were transferred to M. E. Turner, R. R. J. Turner and W. T. Cave on the instructions of M. A. Brown to be held as bare trustees for M. A. Brown with instructions to vote for the said resolution.

Particulars of the shares so transferred were as follows :—

Transferors.	*Number of Shares.*
W. H. White	2,000
H. B. Yuille	4,100
M. D. Appleton	10,000
D. Webb	22,000
W. H. Appleton	3,800
W. J. Bridger	400
C. J. M. Suckling	200
	42,500

These 42,500 shares were so transferred on the completion of the purchase thereof by M. A. Brown under an agreement made July 27, 1928. The transfers were stamped with ad valorem "Conveyance or transfer on sale" duty on the price paid by M. A. Brown and appearing on the transfers, amounting in all to 110,500*l.*

12. In the case of the 45,600 shares of Brotex, Ld., mentioned in para. 11 (*a*) hereof on the instructions given by the registered holders as at November 22, 1928 (i.e., the nominees), the shares of the appellant company were allotted as set out hereunder in accordance with instructions to the nominees given by the respective transferors.

Allotted to respective transferors.	*Preferred.*	*Ordinary.*
E. Ventura	15,000	70,000
L. Browning	40,000	240,000
M. E. Hargreaves	3,000	18,000
K. E. Brown	89,750	538,500
J. C. J. Lonsdale	250	1,500
J. W. Woodfield	40,000	240,000
J. B. Paget	10,000	60,000
A. Soames	10,000	53,000
	208,000	1,221,000
Allotted to others	20,000	147,000
	228,000	1,368,000

The balance of the L. Browning shares (namely, 20,000 preferred and 120,000 ordinary) was allotted to his wife on his instructions, and the other balances were duly allotted to strangers in circumstances not known either to the appellant company or to the Commissioners.

13. Each of the following persons who on November 22, 1928, held shares of Brotex, Ld., requested the liquidator of Brotex, Ld., to nominate himself or herself as the allottee of the shares of the appellant company which were attributable to the number of shares in Brotex, Ld., held by him or her

under the scheme of reconstruction embodied in the agreement for sale and the agreement endorsed thereon, and shares of the appellant company were at the request of the liquidator allotted by the appellant company to such shareholders as follows :—

Shareholder in Brotex, Ld.	No. of shares held in Brotex, Ld.	Shares of appellant company allotted under scheme.	
		Preferred.	Ordinary.
Leonard Browning .	2,000	10,000	60,000
George Cursons . .	700	3,500	21,000
Mable Francis Black .	1,000	5,000	30,000
Stella M. H. Cursons .	500	2,500	15,000
Evelyn Charles Stanley	200	1,000	6,000
John Alexander Holder	400	2,000	12,000
	4,800	24,000	144,000

14. Another of the holders of shares of Brotex, Ld., on November 22, 1928—namely, Ruby Howard Hargreaves, who held 4400 shares of Brotex, Ld., and was accordingly entitled under the scheme to 22,000 preferred shares and 132,000 ordinary shares of the appellant company, requested the liquidator of Brotex, Ld., to allot to J. W. Turland 5000 preferred shares and 30,000 ordinary shares of the appellant company, and the balance of the shares to which she was entitled—namely, 17,000 preferred shares and 102,000 ordinary shares of the appellant company, to herself. Another of the holders of shares of Brotex, Ld.—namely, Cuthbert Frederick Hargreaves, who held 2000 shares of Brotex, Ld. and was accordingly entitled under the scheme to 10,000 preferred shares and 60,000 ordinary shares of the appellant company, requested the liquidator of Brotex, Ld., to allot to Ruby Hargreaves 5000 preferred shares and 30,000 ordinary shares of the appellant company, and the balance of the shares to which he was entitled—namely, 5000 preferred shares and 30,000 ordinary shares of the appellant company,

to himself. All these shares were so allotted by the appellant company at the request of the liquidator accordingly, and the allottees' names were put on the register of members of the appellant company accordingly. The reasons for the instructions given to the liquidator by these two registered holders of shares of Brotex, Ld., to procure the allotment of some of the shares in the appellant company to which they were entitled to persons other than themselves were not known by the appellant company nor by the Commissioners.

15. The facts above mentioned in paras. 13 and 14 accounted for the allotment of shares of the appellant company under the instructions to the liquidator of the registered holders (as at November 22, 1928) of 11,200 shares of Brotex, Ld. The holders (as at November 22, 1928) of the remaining 108,800 shares of Brotex, Ld., requested the liquidator to procure the allotment of the shares of the appellant company to which they were severally entitled —namely, 544,000 preferred shares and 3,264,000 ordinary shares to persons other than themselves, and they were so allotted by the appellant company at the request of the liquidator of Brotex, Ld., accordingly, and the allottees' names were put on the register of members of the appellant company. The reasons for the instructions given to the liquidator to procure the allotment of the shares in question to persons other than the registered holders of shares of Brotex, Ld., were not fully known by the appellant company or the Commissioners in all cases. In the case of a considerable number of shares (the exact number of which was not known but which exceeded 10 per cent. of the total consideration for the sale to the appellant company under the agreement for sale) they were allotted to persons who had agreed to purchase either shares of Brotex, Ld., or shares of the appellant company to which under the scheme registered holders of shares were entitled. Of the shares of the appellant company directed to be allotted to sundry nominees of M. A. Brown, 100,000 preferred shares and 500,000 ordinary shares had been sold by him prior to November 22, 1928, the date of liquidation, and in the instructions given by him to

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M. E. Turner, R. R. J. Turner and W. T. Cave, the registered holders of certain shares of Brotex, Ld., in which he held the beneficial interest, the purchasers of such shares were included for nomination to the extent of the shares thus sold, and such shares were allotted to them accordingly, and their names were entered on the register of members of the appellant company.

16. Specimen copies of the letters of request by shareholders of Brotex, Ld., to the liquidator and by the liquidator to the appellant company in pursuance of which the shares of the appellant company were so allotted were annexed to the case and headed Exhibit D, and might be referred to as part of the case.

17. By reason of the facts hereinbefore mentioned the first registered holders in the books of the appellant company of the shares of the appellant company which formed part of the consideration for the sale to the appellant company under the agreement for sale were to an extent far exceeding 10 per cent. of such shares, and far exceeding 10 per cent. of the total consideration for the sale persons who were not holders of shares in Brotex, Ld.

18. The Commissioners were of opinion that the agreement for sale was liable to ad valorem duty under s. 59 of the Stamp Act, 1891. The total amount or value of the consideration for the sale was agreed between the appellant company and the Commissioners at the sum of 826,648*l.*, arrived at as follows:—

Consideration in shares . . .	£780,000
Consideration in cash	46,648
	£826,648

which was apportioned as to 14,374*l.* part thereof to the consideration for assets of the vendor company excepted from the scope of s. 59 of the Stamp Act, and as to the balance —namely, 812,274*l.*, to the consideration for assets of the vendor company not excepted from the scope of that section The agreement was accordingly assessed by the Commissioners under that section with the ad valorem duty of 8123*l.* and with the fixed duty of 10*s.*

19. It was contended by the appellant company that all the conditions necessary for exemption of the agreement for sale from ad valorem duty under s. 55 of the Finance Act, 1927, were applicable in the present case, and that the agreement for sale was not chargeable with such duty accordingly. The Commissioners were of opinion that the issue of shares to purchasers from or other nominees of holders of shares in Brotex, Ld., was not the issue of shares to holders of shares in Brotex, Ld., within the meaning of the said section, and they maintained the assessment to ad valorem duty accordingly.

20. Whereupon the appellant company, being dissatisfied with the assessment made, and having paid the duty in accordance therewith, called upon the Commissioners to state and sign a case under s. 13 of the Stamp Act, 1891, and the Commissioners signed and stated this case accordingly.

21. The question for the opinion of the Court was whether the agreement for sale was liable to ad valorem duty as assessed by the Commissioners, or whether it was exempt from such duty.

Latter K.C. and *Cyril King* for the appellant company.

Sir William Jowitt A.-G. and *J. H. Stamp* for the Crown.

Rowlatt J. In this case the question is whether the appellant company have complied with s. 55, sub-s. 1 (*c*), of the Finance Act, 1927. The Commissioners have held that they have not. Now I think one approaches this sort of question with the idea—I do not say that it is to guide one too far—that when a company is reconstructed or amalgamated, in substance one expects to find the property in the old hands but under the domination of the new company. But there is another overriding consideration which, I think, is very important, and that is that the scheme of the section is to give relief from stamp duty in respect of a certain document upon the Commissioners being satisfied of the existence of certain facts, and some of the facts are stated in sub-s. 1 (*c*) in defining what the consideration of the acquisition is to be. It seems to me therefore that the Commissioners were certainly right in holding that they ought not to take a document like this and look merely at it and grant or not grant the exemption by seeing what the consideration was expressed to be in the document. I think they were entitled, and indeed were bound to see what the facts were as regards everything mentioned in the section. It seems to me that the right construction has been put upon the facts by the Commissioners. What does s. 55 of the Finance Act, 1927, say ? I am not referring to sub-s. 6 (*b*), I think that throws very little light upon it ; but what does s. 55, sub-s. 1 (*c*), say ? It says that one of the conditions for exemption is " that the consideration for the acquisition . . . . consists as to not less than ninety per cent. thereof— (i) where an undertaking is to be acquired, in the issue of shares in the transferee company to the existing company or to holders of shares in the existing company." It seems to me, if one gets away from the technicalities on the face of the section, that it does not include the issue of shares to the existing company or its nominees, or to the holders of shares in the existing company or their nominees at all. I think what the section says, and what it means is, that the existing company have to take the shares of the new company, and that the shareholders in the existing company, if that is the way it is done, have to take the shares of the new company in exchange for its or their property, and I think that to hold that what has been done in the present case was a compliance with the section would not be carrying out the intention of this sub-section at all. This sub-section is not, in my opinion, intended to enable a vendor company to transfer its shares into rights, or something of that sort, to shares of the new company which can be dealt with freely before registration. I think what is intended is that the existing company or the holders of shares in the existing company must exchange their shares into shares of the new company. That is a straightforward way of reading the section, and in my opinion is consonant with common sense. The transfer of rights and interests like those which have taken place here would not further amalgamation or reconstruction, but would allow any colour of it or change in interest to take place, which is exactly what I think the sub-section is not intended to admit.

I think the Commissioners came to a right decision, and therefore the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *E. F. Turner & Sons.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

R. F. S.

MUREX, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

1931
June 9, 10.

Revenue—Stamp Duty—"Conveyance or Transfer on Sale"—Claim for Exemption—Amalgamation of two Companies—Sale by Vendors of Shares in One Company in Consideration of Allotment of Shares in the Other Company—Allotment to Vendors or their Nominees—Shares in transferee Company actually allotted to Nominees of Vendors—Acquisition by transferee Company of more than 90 *per cent. of Issued Share Capital of existing Company—Stamp Act,* 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 1, 54, *First Schedule—Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 55.

The I. C. I. Company were the holders of 79,900 shares of the P. Company, and two persons were each the holders of 200 shares in the P. Company as the nominees of the I. C. I. Company. The share capital of the P. Company was divided into 87,500 shares. The I. C. I. Company and their two nominees agreed to sell to the M. Company the 80,300 shares in the P. Company, which they held in consideration of the allotment by the M. Company to the I. C. I. Company or their nominees of 30,000 ordinary shares in the M. Company. The agreement and subsequent transfers were executed as part of a scheme for the amalgamation of the P. Company and the M. Company. The I. C. I. Company and their two nominees executed three transfers by which they transferred to the M. Company three blocks of shares in the P. Company, amounting in all to 80,300 shares, in consideration of the allotment by the M. Company to the I. C. I. Company or their nominees of 30,000 ordinary shares in the M. Company. Subsequently the M. Company, in accordance with a previous request, allotted those 30,000 shares to five nominees of the I. C. I. Company. The Commissioners of Inland Revenue decided that the three transfers were liable to ad valorem duty under the heading "Conveyance or transfer on sale" in the First Schedule to the Stamp Act, 1891:—

Held, affirming the decision of the Commissioners, that the issue of the 30,000 shares in the M. Company to the five nominees of the I. C. I. Company was not the issue of shares to the holders of shares in the P. Company in exchange for shares held by them in the P. Company within the meaning of s. 55, sub-s. 1 (*c*) (ii.), of the Finance Act, 1927, and therefore the conditions laid down in that section for exemption from duty did not exist; that although it was necessary to look at the surrounding circumstances in order to see whether there was an amalgamation of two companies or a reconstruction of a company within the meaning of s. 55, yet in considering whether a particular instrument executed in purported performance of such amalgamation or reconstruction was subject to stamp duty, or whether it was exempt from duty, regard could only be had to the terms of that instrument.

CASE stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891 (54 & 55 Vict. c. 39).

1. On May 3, 1930, three instruments were presented on behalf of Murex, Ld., by its solicitors, Messrs. Wild, Collins & Crosse, to the Commissioners of Inland Revenue under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instruments were chargeable.

2. The three instruments, copies of which marked "A," "B" and "C" respectively, were annexed to and formed part of this case, were transfers of shares dated April 17, 1930, whereby Imperial Chemical Industries, Ld., Cecil Mack and Robert Waddell Liddell (hereinafter together referred to as "the vendors") respectively, transferred to Murex, Ld., three blocks of ordinary shares of 6*s*. each fully paid in the Premier Electric Welding Company, Ld. (hereinafter referred to as "the Premier Company"), in consideration of the allotment to Imperial Chemical Industries, Ld., or its nominees of three blocks of ordinary shares of 10*s*. each fully paid in Murex, Ld.

By transfer "A" Imperial Chemical Industries, Ld., transferred 79,900 of the said shares in the Premier Company to Murex, Ld., in consideration of the allotment of 29,850 shares in Murex, Ld.

By transfer "B" Cecil Mack transferred 200 of the said shares in the Premier Company to Murex, Ld., in consideration of the allotment of seventy-five shares in Murex, Ld.

By transfer "C" Robert Waddell Liddell transferred a further 200 of the said shares in the Premier Company to Murex, Ld., for a similar consideration.

3. The said two blocks of 200 shares in the Premier Company registered in the names of Cecil Mack and Robert Waddell Liddell were held by them as nominees of Imperial Chemical Industries, Ld., and they had no beneficial interest in the said shares or any of them.

4. The three instruments of transfer were executed in pursuance of an agreement dated April 16, 1930, and made between the vendors of the one part and Murex, Ld., of the other part (hereinafter referred to as "the vending agreement"), whereby the vendors agreed to sell to Murex, Ld., 80,300 shares in the Premier Company in consideration of 51,466*l.* to be satisfied by the allotment to the vendors or their nominees by Murex, Ld., of 30,000 ordinary shares of 10*s.* each in Murex, Ld., credited as fully paid. A copy of the said agreement marked "D" was also annexed to and formed part of this case. The said agreement and transfers were executed as part of a scheme for the amalgamation of the Premier Company and Murex, Ld.

5. The question for the consideration of the Court was whether the three instruments of transfer marked "A," "B" and "C" were liable to ad valorem stamp duty under or by reference to the heading "Conveyance or transfer on sale" in the First Schedule to the Stamp Act, 1891, and ss. 1 and 54 of that Act and other relevant statutory provisions, or whether the said three instruments were exempt from such stamp duty by reason of s. 55 of the Finance Act, 1927. (1)

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(1) See ante, p. 159, note (1) [*Brotex* case].

6. The Premier Company was incorporated under the Companies Acts, 1908 to 1917, on July 21, 1919, with a nominal capital of 75,000*l.* divided into 75,000 shares of 1*l.* each. In 1928 the capital was reduced to 26,250*l.* divided into 87,500 shares of 6*s.* each, all of which had been issued and were fully paid.

7. Murex, Ld., was incorporated under the Companies Acts, 1908 to 1917, on June 10, 1920. Immediately prior to the date of the vending agreement the nominal capital was 150,000*l.* divided into 300,000 shares of 10*s.* each, of which 211,220 had been issued and were fully paid. There were thus 88,780 shares unissued.

8. At a meeting of the directors of Murex, Ld., held on April 8, 1930, it was resolved that the vending agreement should be, and it was, executed on behalf of Murex, Ld., and that 30,000 of the unissued shares of 10*s.* each in Murex, Ld., should be, and they were, allotted fully paid to the nominees of Imperial Chemical Industries, Ld., in accordance with an informal nomination previously communicated to Murex, Ld., and subsequently confirmed or replaced by the formal nominations set out in the next following paragraph hereof.

9. By letter dated April 16, 1930, the vendors requested and authorized Murex, Ld., to allot to their nominees the 30,000 shares in Murex, Ld., to be allotted to them in pursuance of the vending agreement. The following is a copy of the letter :—

"To/The Directors of Murex Limited.

Gentlemen,

We the undersigned, Imperial Chemical Industries Limited, Cecil Mack and Robert Waddell Liddell request and authorise you to allot to the persons whose names appear below and who are our nominees the shares appearing opposite their respective names such shares to be credited as fully paid up in full satisfaction of the shares to which we are entitled under the agreement dated the 16th day of April, 1930, and made between ourselves of the one part and Murex Limited of the other part.

Nominees.	Address.	Number of 10*s*. Ordinary shares of Murex Limited to be allotted.
Charles Victor Allen .	Imperial Chemical House, Millbank, S.W. 1.	6000
Alan Josiah Stewart .	ditto	6000
Archibald King McCullum	ditto	6000
Edward John Barnsley .	ditto	6000
John Leonard Armstrong	ditto	6000

Dated this 16th day of April, 1930.
Imperial Chemical Industries Ltd.
J. E. James, Secretary.
Cecil Mack.
R. W. Liddell."

10. In pursuance of the vending agreement and in accordance with the request and authority recorded in the letter set out in the last paragraph Murex, Ld., on April 8, 1930, duly allotted to each of the said C. V. Allen, A. J. Stewart, A. K. McCullum, E. J. Barnsley, and J. L. Armstrong 6000 ordinary shares of 10*s*. each in Murex, Ld., credited as fully paid. In due course the said shares were issued to the five allottees and their names were recorded in the list of shareholders in Murex, Ld. Each of the said C. V. Allen, A. J. Stewart, A. K. McCullum, E. J. Barnsley, and J. L. Armstrong was in the employ of Imperial Chemical Industries, Ld., and held the said shares as trustees for Imperial Chemical Industries, Ld., and had no beneficial interest in the said shares. Murex, Ld., thus acquired more than 90 per cent. of the issued share capital of the Premier Company, the consideration for the acquisition consisting in the issue of shares in Murex, Ld.

11. The Commissioners were of opinion that the three instruments of transfer were liable to ad valorem duty by

reference to the heading "Conveyance or transfer on sale" in the First Schedule to the Stamp Act, 1891, and they apportioned the consideration of 51,446*l.* mentioned in the vending agreement between the three instruments and assessed the duty as follows:—

Transfer.	No. of Shares.	Consideration.	Duty.
"A"	79,900	£51,209 12 8	£512 10 0
"B"	200	128 3 8	1 10 0
"C"	200	128 3 8	1 10 0
	80,300	£51,466 0 0	£515 10 0

12. It was contended on behalf of Murex, Ld., that all the conditions necessary for exemption of the three instruments of transfer from ad valorem duty under s. 55 of the Finance Act, 1927, existed and the said three instruments were not chargeable with such duty accordingly.

13. The Commissioners were of opinion that the issue of the said 30,000 shares by Murex, Ld., to C. V. Allen, A. J. Stewart, A. K. McCullum, E. J. Barnsley, and J. L. Armstrong as nominees of Imperial Chemical Industries, Ld., was not the issue of shares to the holders of shares in the Premier Company in exchange for shares held by them in the Premier Company within the meaning of sub-s. 1 (*c*) (ii.) of the said s. 55, and the Commissioners were accordingly not satisfied on that ground that the conditions laid down in the said section existed and therefore maintained the assessment to ad valorem duty.

14. Murex, Ld., being dissatisfied with the assessment and having paid the duty in conformity therewith, required the Commissioners to state and sign a case under s. 13 of the Stamp Act, 1891, and the Commissioners stated and signed this case accordingly.

15. The question for the opinion of the Court was whether the three instruments of transfer were liable to ad valorem

duty as assessed by the Commissioners or were exempt from such duty.

Lionel Cohen K.C. and *Heckscher* for the appellants.

Hon. Sir Stafford Cripps S.-G. and *J. H. Stamp* for the Crown.

Rowlatt J. In my judgment this appeal fails. The question depends upon the consideration for the transfers, the stamping of which is now in question, in respect of the issue of shares in the transferee company to the holders of shares in the existing company. Now it is stated in Buckley on Companies, 11th ed., p. 96, in the note to s. 42 of the Companies Act, 1929—and this is what Mr. Cohen relies upon—that "issue" of shares consists in the shareholder being put completely in possession of his shares. Well, that was the fact with which the author of that work was concerned, but s. 55 of the Finance Act, 1927, requires me to decide the question who is the shareholder who has been put in complete possession of these shares. It seems to me that the persons who have been put into complete possession of the shares in this case are nominees of the shareholders in the existing company. It is true that their character as such, and the fact that they are nominees and not beneficial owners, does not depend upon the issue of the shares or the document which is to be stamped; it depends upon an outside arrangement between them and the company. It is perfectly true to say that, popularly looked at, the commercial effect of this transaction is really the same as if the issue had been to the shareholders, and that therefore it is only a matter of form. But here we are dealing with a Stamp Act, and the Stamp Act deals not with the commercial effect of the transaction but with the vehicle by which it is carried out, and one looks at the vehicle to see what it does; one does not look beyond it and see what, by virtue of other elements in a larger transaction, the whole thing comes to. That being so, it seems to me that the issue of shares in Murex, Ld., here was not an issue to the holders of shares in the Premier Company.

1931

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Rowlatt J.

Mr. Cohen says that I must look at the whole transaction to see the consideration, but then that is exactly the same question. The consideration is the allotment of shares in Murex, Ld., to the Imperial Chemical Industries or their nominees. The issue of the shares is to be not to the Imperial Chemical Industries, but to them or their nominees, and that seems to me to be not within the words of the statute. I have been referred to what I said in the *Brotex* case. (1) I am not certain that my judgment in that case was as clear as I should have liked it to be, but it is quite clear that in regard to the first part of this section one has to look at the surrounding circumstances to see whether there is an amalgamation of two companies or whether there is a reconstruction of a company; it is necessary to see what is being done, but when one comes to the instrument by which the amalgamation or reconstruction is carried out it is necessary to see whether it does exactly what the statute mentions or whether it does not, and if it does not the instrument must be stamped. I think, as I have already said, that this appeal fails, and it must be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Wild, Collins & Crosse.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

(1) Ante, p. 158.

R. F. S.

TOWNSHEND *v.* CHILD.

[1930. T. 1349.]

1932
May 24, 25, 26, 27, 30, 31 ;
June 8, 24.

Husband and Wife—Action by Wife against Third Party—Judgment against Wife—Order against Wife for payment of Costs—Form—Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 1, *sub-s.* 2 ; *s.* 19—*Married Women's Property Act,* 1893 (56 *&* 57 *Vict. c.* 63), *s.* 2.

The plaintiff, a widow, brought an action against the defendant claiming damages for negligence. After the issue of the writ, but before the hearing, the plaintiff married again. At the hearing the jury stopped the case, and judgment with costs was entered for the defendant against the plaintiff.

McCardie J. *held* that he had jurisdiction to enter judgment in the form settled by *Scott* v. *Morley* (1887) 20 Q. B. D. 120, 132, as extended by s. 2 of the Married Women's Property Act, 1893, and to make an order for the payment of the costs to be recoverable against the separate property of the plaintiff, whether subject to restraint on anticipation or not.

FURTHER consideration of an action tried by McCardie J. and a special jury.

On July 22, 1930, the plaintiff, a widow, in the name of Olive Marjorie Townshend (widow), issued a writ against the defendant claiming damages for alleged negligence as a professional man. The action came on for trial on May 24, 1932, when the jury stopped the case, and McCardie J. gave judgment for the defendant against the plaintiff with costs.

After the issue of the writ, but before the hearing, the plaintiff, on March 23, 1932, married one G. B. Blyth, and, accordingly, a question arose as to the form the judgment for costs should take. The facts and arguments appear from the judgment.

J. D. Cassels K.C. and *Robert Fortune* for the plaintiff.

Comyns Carr K.C. and *Blanco White* for the defendant.

Cur. adv. vult.

1932. June 24. McCARDIE J. This action was tried before a special jury and myself on May 24, 1932, and the following days. The plaintiff claimed damages against the defendant for alleged negligence as a professional man. Before the evidence for the defendant had been concluded the jury stopped the case. They expressed a clear and emphatic view that the defendant had not been guilty of negligence, and in substance they stated that the action should not have been brought. I expressed my full concurrence with the view of the jury. I directed that judgment should be entered for the defendant, with costs. Thereupon the point arose as to the form in which the judgment for costs should be entered against the plaintiff. The point was argued before me at a later date.

The question arose by reason of the following facts: The writ was issued on July 22, 1930, when the plaintiff was a widow. The action ran a somewhat lengthy and expensive course, because the matters in dispute were of a complex nature and involved many financial details. On March 23, 1932, the plaintiff ceased to be a widow, for she then married a gentleman named George Blackstone Blyth; but the record remained as it was, and when the action came before me on May 24 last the plaintiff was still described as "Olive Marjorie Townshend (widow)." At the close of the plaintiff's case—namely, on May 27, the defendant's counsel called my attention to the plaintiff's remarriage, and to the state of the record. Thereupon I directed (by consent) that the record should be altered with respect to the plaintiff so as to stand as follows: "Olive Marjorie Townshend, widow (Married since action brought, namely, on March 23, 1932, to George Blackstone Blyth)." Such was the record when the jury gave their verdict and when I directed that judgment with costs should be entered in favour of the defendant.

Now what was the proper form of order as to the recovery of costs, in view of the fact that the plaintiff, who had been a widow through the greater part of the litigation, had become a married woman about two months or so before the judgment for costs was given against her? It might well be thought that the matter was so well settled as to preclude discussion; but the arguments of counsel revealed an apparently obscure state of the law, and the text-books give no clear help. In substance, the defendant's counsel asked that the order for costs should be made against the plaintiff personally. In substance, the plaintiff's counsel asked that the costs should only be recoverable out of such of the plaintiff's separate estate as was not subject to a restraint on anticipation.

Once again the position of a married woman under the laws of this country calls for consideration. If the plaintiff had been a male person or a spinster, no difficulty would have arisen. Broadly speaking, the costs would have been recoverable out of any property or assets that he or she possessed. But in the case of a married woman, however rich she may be, there are still advantages and possible immunities as to costs or other liabilities which are denied to the male person or to the spinster. On the one hand, married women obtain by statutes substantially all the rights and opportunities of men. On the other hand, they are possessed of certain protective privileges which seem to rest on the footing that the married woman is in some respects still to be regarded either as a child or as one unfitted by nature for the assumption of financial responsibility.

I need only say a few words on the historical aspect of the matter. In the seventeenth century a married woman was, in the eyes of the common law, little better than the chattel of her husband. Broadly speaking, her property became his upon marriage, and he gained the control of her person. More than two centuries ago the courts of equity enabled property, whether her own or not, to be settled upon her for her separate use during marriage. This gave her a measure of protection; but it was still feared that the influence of the husband might be too great, and that he might induce her to yield to him the income of the property, even though settled to her separate use. So long as the separate estate of a married woman was unfettered and she had full power to dispose of it, there was little to protect her against the influence and control of her husband. Hence the courts of equity introduced a further doctrine—namely, that of restraint on anticipation. It is said to have been created by Lord Thurlow. (1) As Lush J. puts it in his work on Husband and Wife, 3rd ed., p. 263: "The clause . . . . was accordingly invented by the Chancellors as a barrier against the influence of the husband, and in order to perfect the separate enjoyment of the estate by the wife absolutely freed from his influence and from his debts." Since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), however, separate use is imposed by s. 2 of the statute in the case of a women married after January 1, 1883 (the date of the commencement of the Act: see s. 25), and in these cases a restraint on anticipation may be imposed on property which is not in express terms limited to the separate use of the married woman: see Lush, 3rd ed., p. 262. So much for the question of restraint on anticipation.

I now say a few words as to the historical aspect of a married woman with respect to costs. Broadly speaking, it may be stated that prior to the Married Women's Property Act, 1882, if a married woman commenced legal proceedings she had to sue either jointly with her husband or through her next friend, so that if the proceedings failed the husband or the next friend would be liable for costs: see Lush on Husband and Wife, 3rd ed., p. 295. Then came the Act of 1882, which effected a change in the law. It was provided by s. 1, sub-s. 2, so far as material to this case, that a married woman could be sued and sue either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and that any damages or costs recovered against her should be payable out of her separate property and not otherwise. The effect of the above words was considered by a powerful Court of Appeal in *Scott* v. *Morley* (2), where the learned Lords Justices dealt with the history of the matter and with the effect of the Act of 1882. They decided that the form of judgment against a married woman should be as follows (3): "It is adjudged that the plaintiff do recover £—— and costs (to be taxed) against the defendant (the married woman), such sum and costs to be payable out of her separate property, as hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (the married woman) not subject to any restriction against anticipation, unless, by reason of section 19 of the Married Women's Property Act, 1882, the property shall be liable to execution, notwithstanding such restriction."

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(1) See *Pybus* v. *Smith* (1791) 3 Bro. C. C. 340 (*note* 1).

(2) 20 Q. B. D. 120.

(3) Ibid. 132.

In order to understand the last three lines of the form of judgment it is necessary to turn to s. 19 of the Act of 1882. That section provides, in substance, that nothing in the Act shall affect any settlement respecting the property of married women or render inoperative any restraint against anticipation. There is, however, an important proviso to the section—namely: "No restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors."

It will be seen that the form settled by the Court in *Scott* v. *Morley* (1) gives effect to s. 1, sub-s. 2, of the Act of 1882, and also to s. 19 of the same Act. In *Scott* v. *Morley* (2) the debt was contracted by a woman whilst married. In *Birmingham Excelsior Money Society* v. *Lane* (3), however, the action was against a married woman upon a promissory note made by her before marriage; but the Court of Appeal (Mathew and Cozens-Hardy L.JJ.) held that even in such a case the judgment against her must be in the *Scott* v. *Morley* form (1), and that the judgment could not be enforced against property subject to a restraint on anticipation where the restriction was not contained in a settlement or agreement for a settlement of her own property made by herself. Here again s. 19 was applied in conjunction with s. 1, sub-s. 2, of the Act of 1882. No reference was made by the Court to the

(1) 20 Q. B. D. 132.

(2) 20 Q. B. D. 120.

(3) [1904] 1 K. B. 35.

Married Women's Property Act, 1893 (56 & 57 Vict. c. 63). The Court held, moreover, that *Robinson, King & Co.* v. *Lynes* (1), which was heard before a Divisional Court composed of Wills and Vaughan Williams JJ., did not purport to deal with the actual form in which judgment should be entered against a married woman in respect of a debt incurred before marriage. It may be mentioned here that it is important that the judgment entered against a married woman should be in the correct form. If entered in the wrong form, it may be difficult to secure amendment: see *Oxley* v. *Link* (2) in the Court of Appeal.

Pausing for a moment, I may point out that no actual liability for costs arose against the plaintiff in this present action until judgment was given against her at the close of the trial. Not till then had the defendant any right to costs. The plaintiff was under a possible liability or risk of costs from the time she issued her writ, but there was no actual liability until judgment was entered against her. She was then a married woman. There was here no question of any interlocutory order for costs to be paid forthwith. Even if the costs in this action up to the date of the plaintiff's marriage had constituted a debt which accrued before marriage as against the plaintiff, yet it seems to me that the case would still be covered by the decision of the Court of Appeal in *Birmingham Excelsior Money Society* v. *Lane* (3) already cited. It follows, therefore, so far as I have dealt with the matter, that judgment against the plaintiff should be in the form of *Scott* v. *Morley* (4), as recognized and applied by the Court of Appeal in *Birmingham Excelsior Money Society* v. *Lane.* (3)

Now I must deal with a further point. As Lush J. points out at p. 299 of his work on Husband and Wife, 3rd ed., the state of the law represented by *Scott* v. *Morley* (5) gave rise to an obvious injustice in cases where a married woman whose separate property was restrained from anticipation instituted unsuccessful and sometimes frivolous proceedings.

(1) [1894] 2 Q. B. 577.
(2) [1914] 2 K. B. 734.
(3) [1904] 1 K. B. 35.
(4) 20 Q. B. D. 132.
(5) 20 Q. B. D. 120.

Hence Parliament enacted the Married Women's Property Act, 1893. It provides by s. 2: "In any action or proceeding now or hereafter instituted by a woman"—I call attention to that word—"or by a next friend on her behalf, the court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just."

In my view, I have jurisdiction here to make an order under this section. The plaintiff is a woman. She has instituted these proceedings. The action ought not to have been brought at all. The allegation of negligence was without foundation. In *Nunn & Co.* v. *Tyson* (1) an order was made under the section by a Divisional Court, consisting of Ridley and Bigham JJ., against a married woman who had started interpleader proceedings in which she had failed. In *Pawley* v. *Pawley* (2) an order was made by Buckley J. under the section against a married woman who had failed in an action for alleged breach of agreement. Buckley J. stated (2) that the onus was on the married woman to show why the order should not be made. In *Huntly* (*Marchioness of*) v. *Gaskell* (3) the Court of Appeal made an order under the section, and impliedly, I think, approved of the opinion of Buckley J. in *Pawley* v. *Pawley* (2) already cited. In *Bagley* v. *Maple & Co., Ld.* (4), an order under the section was made by Scrutton J. Finally, I may mention that in *Studley* v. *Studley* (5) the Court of Appeal again made an order under the section, and Cozens-Hardy M.R. expressly approved (6) the view expressed by Buckley J. in *Pawley* v. *Pawley*. (2) If I may respectfully say so, I do not myself think that too much importance should be attached to the point of onus. Each case should be considered on its own circumstances.

(1) [1901] 2 K. B. 487.
(2) [1905] 1 Ch. 593, 596.
(3) [1905] 2 Ch. 656.
(4) (1911) 27 Times L. R. 284.
(5) [1913] P. 119.
(6) Ibid. 126.

Following the above authorities, and bearing in mind the facts of the case before me, I feel it my duty to order that the costs against the plaintiff here shall be recoverable against her separate estate, whether subject to restraint on anticipation or not. The costs have yet to be taxed. There will be liberty to apply in chambers for the appointment of a receiver, or as to sale or otherwise. The costs of the argument before me by learned counsel will be costs in the cause.

Judgment accordingly.

Solicitors for plaintiff: *Winter & Co.*
Solicitors for defendant: *Stones, Morris & Stone.*

W. L. L. B.

1932
July 13.

BIRMINGHAM AND MIDLAND MOTOR OMNIBUS COMPANY, LIMITED *v.* NELSON.

Road Traffic—Public Service Vehicle—Motor Vehicle whether used as Express Carriage or Contract Carriage—Excursion by Railway and Road open to Public on payment of Fare—Vehicle used on Special Occasion for Private Party—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 61, *sub-s.* 1 (*b*) (*c*); *sub-s.* 2.

A return excursion was arranged from a place in the South of England to the works of a manufacturing firm in the Midlands, the excursionists being conveyed by railway between that place and a certain railway station, and by the motor omnibuses of the appellants between that station and the works. Each excursionist paid an inclusive fare and received two tickets, the one entitling him to travel on the railway and the other on the vehicles of the appellants, the latter tickets being collected on these vehicles. The appellants received from the railway company 1*s.* 8*d.* for each person carried on their vehicles, of which sum that company afterwards collected 5*d.* from the manufacturing firm. No persons were in fact carried on the appellants' vehicles except those who held these tickets, and no persons so carried paid any sum directly to the appellants:—

Held, on the construction of the Road Traffic Act, 1930, s. 61, sub-s. 1, read along with sub-s. 2, except the proviso thereto, that the appellants' said vehicles were "express carriages" within sub-s. 1 (*b*), and not "contract carriages" within sub-s. 1 (*c*); that they were not within the proviso to sub-s. 2 so as to be taken out of sub-s. 1 (*b*); and, therefore, that a road service licence under s. 72 of the Act should have been obtained for them.

Quaere, per Talbot and Humphreys JJ., whether the appellants' vehicles were used on a "special occasion" within the meaning of the proviso to sub-s. 2.

CASE stated by the stipendiary magistrate for the city of Birmingham.

Informations were preferred by Mr. S. W. Nelson, a person authorized in that behalf by the Traffic Commissioners for the West Midland Area (hereinafter called "the respondent"), under s. 72 of the Road Traffic Act, 1930, against the Birmingham and Midland Motor Omnibus Company, Ld. (hereinafter called "the appellants"), the Southern Railway Company, and the Great Western Railway Company for that they on September 30 and October 7, 1931, did use a vehicle, to wit, a motor omnibus, in contravention of that section, which provides that a vehicle shall not be used as an express carriage except under a road service licence.

On January 12, 1932, the information was heard by the magistrate.

At the hearing the following facts were proved or admitted: The Southern Railway Company issued advertisements of visits from various places in the South of England to the works of Cadbury Brothers, Ld., at Bournville, which were to take place, and did take place, on September 30 and October 7, 1931. These and other similar trips were organized by the Southern Railway Company and Cadbury Brothers, Ld., in conjunction with the Great Western Railway Company. The arrangements provided that any member of the public buying a ticket from the Southern Railway Company should be conveyed by train to Snow Hill Station, Birmingham, by and over the railway of the Southern Railway Company so far as Basingstoke, and thence by and over the railway of the Great Western Railway Company to Snow Hill Station, and should be conveyed from Snow Hill Station to Bournville and back to Snow Hill Station in the motor vehicles of the appellants. There was evidence that a member of the public desirous of joining one of the trips might obtain from the Great Western Railway Company at Snow Hill a ticket for the journey by motor vehicle only from Snow Hill Station to Bournville and back, but there was no evidence that any such ticket was issued on either September 30 or October 7, 1931. Arrangements were made by Cadbury Brothers, Ld., for conducted tours of Bournville Works and Garden Village and for the entertainment of the visitors to tea on these trips. In addition Cadbury Brothers, Ld., issued some white tickets for distribution by their retailers in Portsmouth and Bournemouth which were regarded as an invitation from that firm to the holders entitling them to special privileges. The appellants received from the Great Western Railway Company some weeks' notice of the dates upon which motor vehicles were required for the visits, and upon receiving that notice the appellants decided whether they would undertake to supply the vehicles required upon these dates. The appellants undertook to supply vehicles on September 30 and October 7, 1931, and were informed by the Great Western Railway Company by telephone as to the number of persons to be carried about an hour and a half before the arrival on each occasion of the train or trains at Snow Hill.

The evidence showed that visits, including the two above mentioned, from various towns were arranged and took place during 1931 on eighteen occasions on and between January 28 and November 25. The appellants received from the Great Western Railway Company 1*s*. 8*d*. for each person carried. Of this sum the Great Western Railway Company collected 1*s*. 3*d*. from the Southern Railway Company, and received the balance of 5*d*. from Cadbury Brothers, Ld. The vehicles supplied by the appellants were provided exclusively for those who had obtained tickets from either of the two railway companies. No persons were carried on the vehicles on either September 30 or October 7 except those who held tickets issued by one or other of these railway companies. No person carried on any of the vehicles on either September 30 or October 7 paid any sum directly to the appellants. The name of the appellants did not appear on any advertisement or on any ticket issued in connection with the two trips, and the appellants did not advertise either of the trips or any similar trips. For the above mentioned visits the Southern Railway Company issued to each passenger two tickets, the one entitling the holder to travel on the railway and the other on the vehicles of the appellants from Snow Hill to Bournville and back. The separate tickets were collected by the appellants on the vehicles on the outward journey. On September 30 and October 7 neither the appellants nor either of these railway companies held a road service licence to operate public service vehicles in connection with the visits to Bournville, but the appellants obtained a licence on November 18, 1931.

On the part of the appellants it was contended that the vehicles used on September 30 and October 7, 1931, were contract carriages as defined in s. 61, sub-s. 1, of the Road Traffic Act, 1930; that the vehicles were used on special occasions for the conveyance of private parties, and that they, therefore, came within the proviso to s. 61, sub-s. 2, of the Act; and that no road service licence was necessary, and that there had been no contravention of s. 72 of the Act.

On the part of the respondent it was contended that the vehicles used on these two dates were express carriages within the meaning of s. 61 of the Act; that the vehicles were not being used on special occasions for the conveyance of private parties; and that a road service licence was necessary, and, as no licence had been granted on either of those dates, the appellants had contravened s. 72.

The magistrate, being of opinion that the vehicles were used as express carriages contrary to s. 72, held that the appellants were guilty of the offences charged, and that the aforesaid railway companies were guilty of aiding and abetting the appellants in the commission of the offences; but he dismissed the summonses under the Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), on payment of five guineas costs.

The question for the Court was whether upon the above facts the magistrate came to a correct determination and decision in law.

Monckton K.C. and *J. W. Morris* for the appellants. The stipendiary magistrate was wrong in holding that the appellants' motor omnibuses were used as "express carriages" within the meaning of s. 61, sub-s. 1 (*b*), of the Road Traffic Act, 1930, and that the appellants by using them or allowing them to be used without having obtained a road service licence were guilty of an offence under s. 72 of the Act. Sect. 61, sub-s. 1, is divided into three parts dealing with different classes of vehicles, namely: (*a*) stage carriages; (*b*) express carriages, and (*c*) contract carriages, for the first two of which a road service licence is required, but for the third of which a licence of that kind is not required. It is not suggested that the appellants' vehicles were stage carriages, and the question is whether they come under class (*b*) express carriages, or class (*c*) contract carriages. The distinction between an express carriage and a contract carriage is that the former is a carriage the proprietor of which makes a contract with another person to let to him a seat in the carriage for hire or reward at a separate fare for a specified journey, while the proprietor of the latter makes a contract with another person to let to him the use of the carriage as a whole for a fixed or agreed rate or sum, which need not be the same as the aggregate of the fares, or paid by the person using the vehicle or at the time when it is used. In the present case the appellants' vehicles did not carry the passengers under a contract made between the appellants and each of the passengers to let to him a seat in their vehicles for hire at a separate fare paid to them for the road part of the journey, but under a contract made between them and the railway companies to let to them the use of these carriages as a whole for a fixed or agreed rate or sum of 1*s.* 8*d.* per passenger carried, which was different from 1*s.* 3*d.*, the part of the total fare applicable to the road portion of the journey, and no person could be carried except as permitted by the contract. On the construction of s. 61, sub-s. 1, the appellants' vehicles were, therefore, not within class (*b*) express carriages, but within class (*c*) contract carriages. It is true that the substantive part of sub-s. 2 enacts that where persons are carried in a motor vehicle in consideration of separate payments made by them whether to the owner of the vehicle or to any other person, the vehicle shall be deemed to be carrying passengers for hire at separate fares. The object of that provision, however, is not to bring every vehicle on which the passengers pay their fares to a person other than the owner within the scope of sub-s. 1 (*a*) and (*b*), but to guard against the mischief of the owner of a vehicle which properly falls within these clauses evading the Act by contracting with a third party to collect the fares and alleging that the vehicle is not within these clauses because the separate fares are not paid to him. Even if, on the construction of the preceding parts of s. 61, these vehicles would have come within the class of express carriages, they were used " on a special occasion for the conveyance of a private party " within the meaning of the proviso to sub-s. 2, and were thereby taken out of that class of vehicles. They were clearly used on a " special occasion," and they were also used for the conveyance of a " private party " within the meaning of that proviso, inasmuch as the passengers were brought together otherwise than by an offer of seats made by the appellants to the public at large. It would be highly inconvenient to require a road service licence for vehicles used in the way in which these vehicles were used.

Sir Boyd Merriman S.-G. and *Wilfrid Lewis* for the respondent. The stipendiary magistrate rightly held that the appellants' vehicles were used as express carriages within the meaning of s. 61, sub-s. 1 (*b*), of the Act of 1930, and that the appellants in so using them without a road licence were guilty of an offence against the Act. Under sub-s. 1 (*b*) " express carriages " are defined as motor vehicles carrying passengers for hire or reward at separate fares; and under sub-s. 1 (*c*) " contract carriages " are defined as motor vehicles carrying passengers for hire or reward under a contract for the use of the vehicle as a whole at or for a fixed or agreed rate or rent. In this case the passengers paid separate fares for the excursion, a definite part of these fares being paid for conveyance in the appellants' vehicles, and they received separate tickets for their conveyance in these vehicles, the fares no doubt being paid directly to the railway company and the vehicles being supplied by the appellants under a contract between them and the railway company. In these circumstances, on the construction of sub-s. 1 taken by itself, these vehicles of the appellants were express carriages under clause (*b*) of that sub-section and not contract carriages under clause (*c*). Sub-s. 1 ought, however, to be read along with sub-s. 2, and when the two sub-sections are read together, it is plain that these vehicles must be deemed to be express carriages, notwithstanding that the passengers made their payments not to the appellants directly but to the railway company, and not solely in respect of the road journey in these vehicles; unless the vehicles came within the proviso to sub-s. 2 as being either used on a special occasion or for the conveyance of a private party. The trip in question on which the appellants' vehicles were used was not a "special occasion" within the meaning of that proviso; but even if the trip was a special occasion it cannot be said that the excursionists who were carried in these vehicles formed a "private party" within that proviso, inasmuch as it was not necessary that they should be associated with each other in any way except as passengers on the same journey, and it was possible for strangers to buy tickets for the road part of the journey on these vehicles. These vehicles, therefore, were not within the proviso so as to be taken out of the class of express carriages. In order that a vehicle may be used as a contract carriage only a public service licence under s. 67, sub-s. 1, is required, but in order that it may be used as an express carriage not only a public service licence but also a road service licence under s. 72, sub-s. 1, is required. If the view of the appellants were to be sustained that motor vehicles used as these motor omnibuses were used were contract carriages which did not require a road service licence, there would be very few vehicles left which did require that licence, and the result would be that road traffic control would be greatly lessened and the provisions of the Act regarding it rendered correspondingly ineffective. As the appellants used their motor omnibuses or permitted them to be used on the occasion in question without a road service licence, they were rightly convicted of an offence against the Act.

Monckton K.C. replied.

LORD HEWART C.J. In my opinion the decision of the learned stipendiary magistrate was manifestly right. Sect. 61, sub-s. 2, of the Road Traffic Act, 1930, provides that " where persons are carried in a motor vehicle for any journey in consideration of separate payments made by them, whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares, whether the payments are solely in respect of the journey or not." Those words seem to me to be clearly applicable to this case. It has been argued by Mr. Monckton on behalf of the appellants that they are prevented from applying to the case because the proviso to that sub-section applies to it. That proviso involves two things—namely, that the vehicle be used on a special occasion, and that it be used for the conveyance of a private party. I cannot see any ground upon which the occasion now in question can properly be called a special occasion; but to say that the party was a private party seems to me to be plainly in contradiction of the facts. The members of the party were brought together by means of advertisements issued to the public as a whole. For these reasons I think that the contentions on behalf of the respondent were sound, that the decision of the stipendiary magistrate was right, and that this appeal should therefore be dismissed.

TALBOT J. I am of the same opinion. The learned stipendiary magistrate held that the appellants were guilty of the offence of using an express carriage without having obtained a road service licence under s. 72 of the Road Traffic Act, 1930. The question raised on this appeal from his decision is whether these vehicles of the appellants, used in the way in which they were used, were " express carriages " within the meaning of s. 61, sub-s. 1 (*b*), of the Act. The appellants say that they are " contract carriages " under cl. (*c*) of that sub-section. It may be true, and it probably is true, that, if cl. (*c*) be read without the explanation which is provided by the Act itself, it includes a vehicle in which passengers are carried on the road in pursuance of a contract for the hire or use of the vehicle in which they are carried made with the person who has the ownership or control of the vehicle. The passengers are carried in the vehicle by some one who hires it for the carriage of passengers, and he pays those who have the control of it. Thus, in the present case there was a contract between the railway company and the appellants under which the railway company was to carry in the appellants' coaches certain passengers who reached by the railway the point at which the appellants' coaches started on the outward journey. But that is restricted and explained by sub-s. 2, and I am bound to say that the intention and effect of that sub-section appear to me to be perfectly plain. It declares that "where persons are carried in a motor vehicle for any journey in consideration of separate payments made by them"—stopping there one observes that these words disregard all questions as to the ownership of the vehicle, as to the way in which the passengers go to it or are brought to it, and as to the manner in which or the amount which they pay. The condition is that they be carried in a motor vehicle in consideration of separate payments made by them. In order to be entitled to ride in a motor vehicle they must get the consent of those who have the control of it. They may get that consent either without payment or for payment, and if they get it for payment and each of them pays, then they are carried in the vehicle in consideration of separate payments made by them. In order to guard against any ambiguity the words are added, "whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares, whether the payments are solely in respect of the journey or not." That provision about carrying passengers for hire or reward at separate fares takes us back to the first two divisions of public service vehicles in sub-s. 1—namely, stage carriages and express carriages, and it means that where carriages are used in that way, as they were in this case, they are to come within whichever of these categories is appropriate to the particular circumstances. In other words the appellants have no alternative to the position that these vehicles were express carriages within the meaning of the Act. The only way in which they can avoid that conclusion is by bringing themselves within the proviso to sub-s. 2. That proviso exempts from the category within which these vehicles fall vehicles used on a special occasion for the conveyance of a private party. It is obvious that there may be questions very difficult to decide in particular cases whether a vehicle is used on a special occasion for the conveyance of a private party. I do not think that the question whether these vehicles were used on a special occasion is wholly free from doubt. With regard, however, to the other question, of which it is equally incumbent upon the appellants to prove the affirmative if they are to escape the effect of the preceding parts of the section—namely, whether these vehicles were used for the conveyance of a private party, it seems to me almost impossible to argue that they were so used, and indeed counsel for the appellants could only support the contention that they were so used by giving to the expression "private party" a construction remote from any which, so far as I know, has ever been attributed to it in any connection—namely, a party assembled by some person other than the proprietor of a vehicle in which the members of the party travelled.

In my opinion this appeal should be dismissed.

Humphreys J. I agree in the judgments which have been delivered. I should like to add that I share the doubt, which has been expressed by my brother Talbot, whether or not the occasion in question may properly be described as a "special occasion," but I express no opinion about that.

Appeal dismissed.

Solicitors for appellants: *Sydney Morse & Co.*
Solicitor for respondent: *The Treasury Solicitor.*

J. R.

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July 27.

GLAMORGAN COUNTY COUNCIL *v.* BIRMINGHAM CORPORATION.

Poor Law—Removal Order—Pauper's Husband serving Term of Imprisonment — Consortium — Poor Law Act, 1930 (20 *Geo.* 5, *c.* 17), *ss.* 93, *sub-ss.* 1, 6; 94, 104.

Quarter sessions made an order for the removal from the city of B. to her county of settlement of a pauper and her child who were not entitled to any of the exceptions from removability contained in s. 93 of the Poor Law Act, 1930. At the date of the order the husband of the pauper was serving a sentence of six months' imprisonment at B. after conviction of forgery, and by the prison regulations the pauper was permitted to visit her husband in prison at intervals of several weeks. Neither the pauper nor her husband consented to the order:—

Held, that the order was rightly made, since the common law principle that an order could not be made without consent for the removal of a wife so as to separate her from the husband with whom she was actually or constructively residing had ceased to be of effect since the passing of the Poor Law Act, 1930, ss. 93, 94 and 104 of which exclusively governed the matter, and rendered the pauper removable as being a person in receipt of relief within s. 94 and not rendered irremovable by s. 93.

Held, further, by Avory and Humphreys JJ., that the order was also right on the ground that in the circumstances the pauper and her husband could not be said to be constructively living together.

CASE stated by quarter sessions.

At the general quarter sessions of the peace in and for the city of Birmingham on November 23, 1931, the council of the administrative county of Glamorgan were the appellants and the corporation of the city of Birmingham were the respondents in an appeal heard and determined by the recorder in and for the city in which the following facts were admitted, no evidence being called:—

On July 10, 1931, one Annie Williams and her infant child, being paupers, became chargeable to the city of Birmingham. On July 16, 1931, William John Ethelbert Williams, the husband of Annie Williams and the father of the said child, was sentenced to six months' imprisonment with hard labour at the Birmingham Assizes on a charge of forgery, having been detained in custody since July 10, 1931, or earlier. While in custody, both before and after his conviction, he was detained at His Majesty's prison at Winson Green, situate in the city of Birmingham. On August 11, 1931, certain justices in and for the city of Birmingham made an order whereby it was adjudged that Annie Williams and her child should be removed to the county of Glamorgan. Apart from questions of law hereinafter mentioned, the legal settlement of Williams and his family was in the county of Glamorgan, although, up to his arrest, he and they had been living in lodgings in Birmingham since about September, 1930. Neither husband nor wife consented to the order of removal. By the prison regulations the wife would be permitted to visit the husband while he was in prison three times between his conviction on July 16 and November 23, and she in fact visited him twice.

It was contended by the appellants before quarter sessions that the order of removal was bad on the ground that it violated the old principle of the common law as followed in *Reg.* v. *Stogumber* (*Inhabitants of*) (1) and other cases, that husband and wife should not be separated, and that the wife and child were exempt from removal in the circumstances set out hereinbefore. It was contended by the respondents: (*a*) that, if such a common law principle ever existed, which they did not admit, it was no longer applicable to the admitted facts of the present case, and that a status of irremovability could only be acquired under the provisions of the Poor Law Act, 1930 (reference in particular being made to ss. 84, 93, 94 and 104 of that Act (2), to the Poor (Settlement and Removal)

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(1) (1839) 9 Ad. & E. 622.

(2) By Poor Law Act, 1930 (20 Geo. 5, c. 17), s. 93, sub-s. 1: "No person shall be removed, nor shall any order be made for the removal of any person, from any county or county borough in which he has resided for one year next before the application for the order. . . ."

Sub-s. 6: "Nothing in this Act shall affect any exemption from removal to which by the common law the owner of an estate and the husband and wife of such an owner are entitled, or affect any rule of common law against the separation from his mother of a child under the age of seven."

Sect. 94: "A person who is in receipt of relief, unless rendered irremovable by virtue of the foregoing provisions of this Act, may be removed in manner hereinafter provided to his county or county borough of settlement."

Sect. 104: "No person shall derive or acquire, or be deemed to have

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Act, 1809, and to the Poor Law Act, 1927), and that the wife and child were not exempt from removal; and (*b*) that, even if that contention were wrong, on the admitted facts of the case there was no consortium such as the alleged common law principle existed to preserve, as Williams was serving a sentence of imprisonment for a criminal offence, and accordingly the alleged common law principle did not apply.

The recorder accepted both the respondents' contentions and dismissed the appeal with costs.

The question submitted to the High Court was whether that decision was right.

Montgomery K.C. and *Smallwood* for appellants.

Tyldesley Jones K.C. and *Finnemore* for respondents.

LORD HEWART C.J. In this case it has been contended by the appellants, the council of the county of Glamorgan, that the order of removal of August 11, 1931, was bad on the ground that it violated the old principle of the common law, as followed in certain cases to which our attention has been directed, that husband and wife should not be separated where they have been actually or constructively living together. On the other hand, it has been contended by Mr. Tyldesley Jones for the respondents, the corporation of Birmingham, that, if such a common law principle ever existed, it is no longer applicable in this case in view of the provisions of the Poor Law Act, 1930. There was a second contention, which it does not appear to me to be necessary to enter into. The recorder accepted the contentions of the respondents, and from his decision the present appeal comes.

I am convinced by the argument of Mr. Tyldesley Jones that this case is concluded by the statute of 1930. Our attention has been directed to a series of old cases dealing with the principle that husband and wife are not to be

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derived or acquired, a settlement or status of irremovability except in accordance with the provisions of this Part of this Act; and any question arising on or after the first day of October, 1927, as to the settlement or removability of any person shall be determined as if those provisions had been in force at all material dates: . . . ."

separated where there is some degree of consortium between them, but I think that, when one looks at the comparatively clear terms of the Poor Law Act, 1930, that old common law principle must be said to have gone. By s. 104 of the statute it is provided in the first place that no person shall derive or acquire, or be deemed to have derived or acquired, a settlement or status of irremovability except in accordance with the provisions of that Part of the Act, and then the section goes on to affirm that any question arising on or after October 1, 1927, as to the settlement or removability of any person shall be determined as if those provisions had been in force at all material dates. The provisions about irremovability are to be found in s. 93, and it is to be observed that by sub-s. 6 of that section it is provided that nothing in the Act shall affect any exemption from removal to which by the common law the owner of an estate and the husband and wife of such an owner are entitled, or affect any rule of common law against the separation from his mother of a child under the age of seven. In other words, in two particular and well-defined respects the old common law rule is preserved. A provision of that kind, it is contended with force, would not have been necessary if it were not the case that, otherwise, by s. 104, those common law rules would have been destroyed. It is possible that hardship may sometimes be involved by the provisions of the statute, but we have to administer the statute as we find it, and it seems to me that the argument which has been based by Mr. Tyldesley Jones on the statute is irresistible.

I think, therefore, that this appeal should be dismissed.

AVORY J. I have arrived at the same conclusion. To answer the question whether or not the common law principle, to which reference has been made in this case, has been superseded by the provisions of the Poor Law Act, 1930, it is necessary in the first place to ascertain precisely what the common law principle was. In my opinion, the common law principle was that the wife could not be removed to her husband's settlement so as to separate her from her husband with whom she was residing, except by the consent of the wife, or of the husband alone if the wife were incapable of consenting. There is nothing in the cases which have been cited to us—*Rex* v. *Carleton* (1); *Reg.* v. *Stogumber* (*Inhabitants of*) (2); and *Reg.* v. *Preston Union* (3)—which is inconsistent with the principle as I have stated it. *Reg.* v. *Stogumber* (*Inhabitants of*) (2) was, in my opinion, decided on the ground that there was in that case what is called consortium between husband and wife. In other words, they were constructively living together. Pollock B. in *Reg.* v. *Preston Union* (3), referring to *Reg.* v. *Stogumber* (*Inhabitants of*) (2), said (4): "How far [the question of the consent of the husband] had any effect on the decision of the Court it seems unnecessary now to consider, for the case was put in the argument entirely on the ground that the husband and wife had the means of keeping up the consortium. I should think in dealing with such cases nowadays, that any Court would hold that there could be no consortium where a husband was undergoing a sentence of penal servitude for life." In my opinion that applies with equal force whether the sentence is three years or even six months. I do not think that in such a case the husband and wife can be considered to be constructively living together, and so I doubt whether, if the old common law principle were applied in the circumstances of the present case, it would operate to render bad the order which was made by quarter sessions.

But, apart from that question, I agree that the Act of 1930 has destroyed the common law principle, that in no case, if that is the true principle, shall any order be made for the removal of a wife which has the effect of separating her from her husband. Sect. 94 is in these words: "A person who is in receipt of relief, unless rendered irremovable by virtue of the foregoing provisions of this Act, may be removed in manner hereinafter provided to his county or county borough of settlement." "A person" clearly includes a wife. This wife was in fact in receipt of relief, and unless she was rendered irremovable by virtue of the foregoing provisions of the Act—namely, the provisions of s. 93, the enactment is plain that she might be removed to her county settlement, and there is nothing in s. 93 which makes her irremovable from Birmingham. She had not resided there for one year nor had her husband resided there for one year next before the application. So the plain effect of s. 94 is that this wife was removable to her county settlement, which was the settlement of her husband in Glamorgan.

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(1) (1775) Burr. S. C. 813.

(2) 9 Ad. & E. 622.

(3) (1883) 11 Q. B. D. 113.

(4) Ibid. 116.

Apart from s. 104, to which my Lord has referred, and which definitely enacts that any question arising as to the removability of a person, such as the wife in this case, shall be determined as if the provisions of the statute has been in force at all material dates, there is one further point which requires consideration, and that is the argument of Mr. Montgomery that this, being general legislation, cannot be taken to affect a special common law principle. According to the words of Channell J., in *Rex* v. *Salisbury* (*Bishop*) (1), the general Act must not be read as repealing the common law relating to a special and particular matter unless there is something in the general Act to indicate an intention to deal with that special and particular matter. I think that it is sufficient answer to that argument to say that, in view of the emphatic terms of ss. 94 and 104, this Act does deal with the particular matter and the circumstances in which a wife may be removed, although the effect is to separate her from her husband. But, apart from that, I agree that sub-s. 6 of s. 93 shows a clear intention on the part of the Legislature to deal with common law principles affecting the removal of paupers. Therefore, it is clear that the Legislature had in mind at the time this Act was passed certain special common law principles applicable to the matter, and dealt at least with some of them.

I see no reason to question the liability of the wife to be removed, although the effect may be to separate her from her husband, in a case where the husband is in prison. I agree, therefore, that the appeal should be dismissed.

(1) [1901] 1 K. B. 573, 579.

HUMPHREYS J. I am of the same opinion. On the first point I certainly do not differ from what has been said as to the probable extent of the old common law principle, and I am quite clear that that principle would never have been applied by the Courts to a case such as the present, where the only evidence of consortium is the fact that on two or three occasions during the six months' imprisonment of the husband it was possible for the wife to have an interview with him in the presence of some official. If that is consortium, it seems to me that communication by letter would amount to consortium. No more information could be conveyed by one spouse to the other than could be conveyed by a letter, and I have the very strongest doubts whether, even accepting the old common law rule at the highest at which it has been put by Mr. Montgomery, there was in this case any rule which could have been applied. I also agree with both judgments as to the effect of the Poor Law Act, 1930, in dealing with the common law rule, whatever it was.

I think that the real difficulty arises from the argument of Mr. Montgomery that s. 104 was only intended to deal with two specific matters: one a question of settlement, which does not arise, and the other that phrase so familiar to lawyers, status of irremovability, and that the section only dealt with irremovability by reason of twelve months' residence. I think that something might be said for that argument if s. 104 stopped at the end of the first part of it, but when one looks further it seems to be clear that the Legislature was dealing with the whole question whether a person can be removed, because the section continues, "any question arising on or after the first day of October, 1927, as to the settlement or removability of any person shall be determined as if [the provisions of the Act] had been in force at all material dates." That seems to me to be a clear indication that after the passing of the Act and, indeed, from October 1, 1927, recourse should be had to the terms of the Act to decide whether any particular person was or was not removable. I agree further with the observations which have

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been made by my Lord and Avory J. as to the effect of sub-s. 6 of s. 93.

For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellants: *D. J. Parry, Cardiff.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for F. H. C. Wiltshire, Birmingham.*

G. F. L. B.

Distinguished. SHORE *v.* MINISTRY OF WORKS. [1950] 2 All E.R. 228.

Applied. MURRAY *v.* HARRINGAY ARENA LD. [1951] 2 K. B. 529

HALL *v.* BROOKLANDS AUTO RACING CLUB.

[1930. H. 3471.]

C. A.

1932

May 30, 31
June 1, 2, 2

Negligence—Motor Race Course—Dangerous Sport—Spectator admitted on Payment—Duty of Owners to Invitees—Implied Contract—Reasonable Care for Safety—Unforeseen Accident.

Certain persons were the owners of a racing track for motor cars. The track was oval in shape and measured two miles or more in circumference. It contained a long straight stretch known as the finishing straight, which was over 100 feet wide and was bounded on its outer side by a cement kerb 6 inches in height, beyond which was a strip of grass 4 feet 5 inches in width enclosed within an iron railing 4 feet 6 inches high. Spectators were admitted on payment to view the races, and stands were provided in which they could do this in safety, but many persons preferred to stand along and outside the railing. Among the competing cars in a long distance race on this track two cars were running along the finishing straight at a pace of over 100 miles an hour and were approaching a sharp bend to the left; the car in front and more to the left turned to the right; the other car did the same, but in so doing touched the off side of the first mentioned car, with the strange result that the first mentioned car shot into the air over the kerb and the grass margin and into the railing, killing two spectators and injuring others. The course was opened in 1907. No accident like this had ever happened before.

In an action by one of the injured spectators against the owners of the racing track the jury found that the defendants were negligent in that having invited the public to witness a highly dangerous sport they had failed by notices or otherwise to give warning of, or protection from, the dangers incident thereto, and to keep spectators at a safe distance from the track. Judgment having been given for the plaintiff on these findings:—

Held, that it was the duty of the appellants to see that the course was as free from danger as reasonable care and skill could make it, but

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that they were not insurers against accidents which no reasonable diligence could foresee or against dangers inherent in a sport which any reasonable spectator can foresee and of which he takes the risk, and consequently that there was no evidence to support the verdict of the jury.

Francis v. *Cockrell* (1870) L. R. 5 Q. B. 184, 501; *Readhead* v. *Midland Ry. Co.* (1869) L. R. 4 Q. B. 379; *Cox* v. *Coulson* [1916] 2 K. B. 177 and *Maclenan* v. *Segar* [1917] 2 K. B. 325 followed and approved.

APPEAL from the judgment of McCardie J. in an action tried before the learned judge and a special jury.

The facts, of which a short summary appears in the head-note, are stated in detail in the written judgments of Scrutton and Greer L.JJ.

The questions put to the jury and their answers thereto were as follows:—

(1.) Did the defendant Company omit any and what reasonable precaution for the safety of the spectators? Answer—Yes. Failure to exhibit warning notices generally. Failure to increase height of barrier or number of barriers in view of the increased speed of cars. Failure to keep spectators at a safe distance from the track. Failure to realize that the position of the accident was the fastest part of the course and that special precaution was necessary.

(2.) Was the defendant Company guilty of any and what negligence whereby injury was caused to the plaintiff? Answer—Yes. The defendant Company being owners of premises used for the carrying on of a highly dangerous sport at which accidents had happened and were likely to happen, by advertisement or otherwise invited the public to collect to witness a highly dangerous sport, and failed by notices or otherwise to give warning of or protection from the dangers arising from the sport, and as in answer to question No. 1.

They further found that the drivers of the two cars which collided were not guilty of negligence, and that the damages were 988*l*.

Upon these findings judgment was entered for the plaintiff. The defendants appealed.

Schiller K.C., *Doughty K.C.* and *H. D. Samuels* for the appellants. There was no evidence to support the verdict of the jury. Their answers disclose a confusion in their minds between danger inherent in the appellants' premises and danger from the performance which was being witnessed. Persons who erect structures and invite others, upon payment, to enter upon them for one purpose or another, have an obligation imposed upon them by law. The obligation is to have the structure reasonably fit for the purpose so far as reasonable care and skill can make it. It is the same whether the purpose be that of a grand stand at a race course: *Francis* v. *Cockrell* (1); or that of a canal: *Parnaby* v. *Lancaster Canal Co.* (2); or of a dock: *Mersey Docks Trustees* v. *Gibbs* (3); a railway: *Readhead* v. *Midland Ry. Co.* (4); a theatre: *Cox* v. *Coulson* (5); or a hotel: *Maclenan* v. *Segar*. (6) The same would apply if the purpose was to witness a cricket match, an athletic contest or a cinematograph show. If the performance happens to be a dangerous one, that imposes no higher duty on the owner of the structure; he owes no duty to rid the performance of danger. If spectators come to witness a dangerous performance, they take the risk of the danger. A spectator at a cricket ground cannot complain if he is hurt by a cricket ball which is hit out of the ground into the pavilion. When the danger is not within the structure itself, but comes from outside, the risk is the spectator's concern.

Even if the appellants were bound to take steps to mitigate extraneous dangers, they were not bound to guard against events which no reasonable prudence could have foreseen. They are not insurers against perils; they are only bound to take reasonable care, and cannot be charged with negligence in not effectually guarding against an accident which had never been known to happen before.

[1 Smith's Leading Cases, note to *Indermaur* v. *Dames* (7), 13th ed., pp. 858, 859, was also referred to.]

A. M. Sullivan K.C. and *Martin O'Connor* for the respondent. The obligation of those who erect a grand stand from which

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(1) L. R. 5 Q. B. 184, 501.
(2) (1839) 11 A. & E. 223, 230.
(3) (1866) L. R. 1 H. L. 93.
(4) L. R. 4 Q. B. 379.
(5) [1916] 2 K. B. 177.
(6) [1917] 2 K. B. 325.
(7) (1866) L. R. 1 C. P. 274; (1867) L. R. 2 C. P. 311.

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to view a steeplechase, or a pavilion from which to view a cricket match, is really no measure of the duty of those who admit for payment spectators of motor speed trials. To compare the two is to ignore the development in late years of the capacity of motor vehicles for use and for destruction. Those who argue that the owners of the structure are only concerned with dangers in the structure itself are pressing upon the Court too technical a view. Common sense demands that the conformation and position of the structure should vary with the danger of the performance or entertainment which is to be witnessed, and the greater the danger to human life the greater the foresight the owners must exercise and the greater the protection they must afford. Every one knows that motor-cars are liable to skid and that tyres are liable to burst, and surely it does not require more than reasonable foresight to anticipate that a railing at a distance of 4 feet 6 inches from the course is a very inadequate safeguard against a skidding car which was running at 100 miles an hour. And in answer to the argument that the spectator takes the risk of outside dangers, he may not know, while the owners of the course know well, the extent of those dangers; and a man may take the risk of being hit by a cricket ball without therefore accepting the chance of being killed or permanently injured by a car charging into the railing. It is submitted that in the circumstances it was the duty of the appellants to provide the respondent with a standing from which to view the race which should be as safe as proper care and skill, not only of the appellants themselves, but of their designers, builders, and engineers, could make it, and the fact that, for all that appears, the track remained in 1930 as it was in 1907 is strong evidence to support the verdict of the jury that the appellants were guilty of the negligence which the verdict has imputed to them.

Schiller K.C. in reply.

A. M. Wallace for a third party.

Cur. adv. vult.

June 20. The following written judgments were delivered:—

SCRUTTON L.J. A spectator at a motor race meeting at Brooklands was injured by a car which came through the railing dividing the track from the space appropriated to spectators. He sued: (1.) the Company owning the track, and (2.) the drivers and owners of the two cars that by colliding caused the car that did the injury to deviate. The jury found that the second defendants were not negligent, and the plaintiff does not appeal from the judgment in their favour. As to the first defendants, the race meeting was being held by another body, to whom the first defendants had in effect let the track. But counsel for the first defendants accepted liability, if any, for this other body. I only mention this, because it must not be taken that when a landlord lets his premises to a tenant, who produces therein an entertainment, the landlord is necessarily liable for damage caused by the tenant's entertainment.

The question of the liability of the Brooklands Company raises questions which are of general application to any cases where landowners admit for payment to their land persons who desire to witness sports or competitions carried on thereon, if those sports may involve risk of danger to persons witnessing them. A spectator at Lord's or the Oval runs the risk of being hit by a cricket ball, or coming into collision with a fielder running hard to stop a ball from going over the boundary, and himself tumbling over the boundary in doing so. Spectators at football or hockey or polo matches run similar risks both from the ball and from collisions with players or polo ponies. Spectators who pay for admission to golf courses to witness important matches, though they keep beyond the boundaries required by the stewards, run the risk of the players slicing or pulling balls which may hit them with considerable velocity and damage. Those who pay for admission or seats in stands at a flying meeting run a risk of the performing aeroplanes falling on their heads. What is the liability of the person taking payment for permission to view these various sports?

The facts relevant to this particular case are hardly in dispute. The racing course at Brooklands is a kind of oval over two miles round, including at one part a long straight stretch over 100 feet wide. On the right-hand side, where many spectators stand, the course was in 1930 bounded by a concrete kerb 6 inches high; on the far side of the kerb was 4 feet 5 inches of grass, and then an iron railing 4 feet 6 inches high, the nature of which can be seen from a photograph showing the fence where it was not injured, and two more showing the damage at the scene of the accident. The photographs also show the ground where spectators can watch the races, rising uphill to various stands in which, if they wish, they can sit. They are absolutely safe in the greater part of this ground, but naturally they like to get as near the racing as they can, and they place themselves along the railing.

On the day of the racing a long distance competition was in progress under handicap. There were coming along the straight a small Austin ahead, and, gaining on it, three larger cars, an Alfa Romeo in front, and behind it on each side, a Talbot, numbered 22, on the left, and a Talbot, numbered 21, on the right or behind the Alfa Romeo. Lord Howe, called by the plaintiff, describes the position as he saw it from the left of the track. The police inspector, standing on the bridge over the track which the cars were approaching, says Talbot 22 was on the near side (left) of the track. The Alfa Romeo was a car's length in front of the Talbot 22 and a car's width from its off side. The Talbot 21 was running to the right of the Alfa Romeo, with its near side in line with the off wheels of the Romeo, and, he thought, 20 feet behind it. Obviously this witness would be in a better position to judge of the lateral positions of the cars on the track than of their positions up and down the track. There is apparently an advantage to be got by running behind or at the tail of a car, in that the first car exercises suction on the following car which enables that car to keep its position with less strain on its engine. There was conflicting evidence as to whether one or both of the Talbots in that position were or were not "slip-streaming," as the process of running at the tail of a car is called. Mr. Davis, a very experienced racing man, says that if Lord Howe's evidence is correct these cars were not slip-streaming. The driver of the Talbot 21 thinks he was getting the benefit of the suction of the Romeo. There is no rule against slip-streaming, but some drivers do not like it.

The small Austin ahead was going 85 miles an hour, and the bunch of approaching cars was catching it up at 103 miles an hour, and all the cars were approaching a sharp bend to the left which would be better taken from the right of the straight track. Under these circumstances, the Talbot 22 on the left of the group appears to have swerved or directed its course to the right, and the hub of its off hind wheel touched the hub of the near front wheel of the Talbot 21, with the most startling result. Lord Howe says: "The blow appeared to throw the Talbot 22 through the air, and it appeared to me to land almost on top of the spectators and the railings." . . . . "The car was literally thrown through the air." Mrs. Hedinger, a racing driver called by the plaintiff, who saw the accident, says the Talbot 21 hit the Talbot 22 in the centre on the off side, "threw the first one (22) into the railings," and itself bounced and fell over on the track. The police inspector, standing on the bridge crossing the track and watching the approaching cars, says: "I saw 21 and 22 swerve to the off side of the track; 22 went up into the air and struck the top of the railings. It turned completely upside down and lay in the enclosure." "I saw it distinctly in the air. . . . . The leap of the car took place before the kerb was reached." Three witnesses—two called by the plaintiff—speak of this extraordinary leap in the air; no witness contradicts it; no witness says the kerb was struck. There is no suggestion that anything was wrong with the track itself, as distinguished from its boundaries. As to these boundaries, the plaintiff's witness, Lord Howe, says: "I think the Brooklands Racing Track is very well protected, as well protected as it reasonably could be expected to be. I do not think that any barrier would have prevented this car getting into the crowd."

The accident happened in May, 1930; the Brooklands track had been in use for races since 1907, and it is not disputed that this was the first time any spectator had been injured by a car leaving the track. Further, the evidence is undisputed that no car in the straight had ever gone through the railings. One car (Mr. Cook's) had hit them and bulged them, but not gone through them; another car (Mr. Harvey's) had apparently in a skid hit them, but not damaged them. Both these cars were at the time engaged in a race for fancy driving, in which the cars came down the straight and turned at an angle of 180 degrees round a tub in the centre of the straight, a manœuvre which would involve running near the railings before you reached the tub. A third car, an Austin, in practice struck the kerb and turned over, but did not apparently hit the railings. Cars had gone through the railings on the sloping and curved banking, and on bends, but none on the straight, and there was uncontradicted evidence that no collision between cars had ever caused damage in the twenty-three years' history of the track.

On this state of facts, practically undisputed, two questions arise: (1.) What is the duty of the defendant Company, who take money from the spectator for their permission to him to view the racing on their premises? (2.) This duty being ascertained, was there evidence on which a jury could reasonably find that the defendants had not complied with it?

The authorities are not clear on the answer to be given to the first question. Any one who reads the discussion of the difficulties involved, in Salmond on Torts, 7th ed., pp. 446 to 466; in Smith's Leading Cases, 13th ed., pp. 858, 859, in the note to *Indermaur* v. *Dames* (1); and in an article on the Duty of Invitors in the Law Quarterly Review, vol. 32, p. 255, will be convinced of this. There are doubts whether an invitee on payment is only entitled to that degree of care which Willes J. formulates in

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(1) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

Indermaur v. *Dames* (1), a duty to warn of traps (2), or whether he is further entitled to have the premises for which he pays reasonably safe. There is a further doubt whether on payment you are entitled to have reasonable safety as an absolute promise, or only, as in the case of *Readhead* v. *Midland Ry.* (3), reasonable care to guard against dangers which the landowner or owner of a chattel may know or with reasonable care should foresee. There is further the question whether, when there is nothing but payment, the implied term in the contract must take account of the knowledge of the person paying, or of a reasonable spectator, of the risks which are involved in watching the particular spectacle, such as the risks of being hit by a cricket ball at Lord's, or the risks in a flying exhibition at Hendon of an aeroplane falling on one's head. There must be an implied term in the contract where you simply pay your money and pass through a turnstile. On the authorities the term to be implied in a contract is for the Court, not for the jury. In *Behn* v. *Burness* (4) the Court of Exchequer Chamber laid down that the Court was to determine whether a term of the contract was a condition precedent, a matter of implication, the jury finding any facts in dispute. The Court of Appeal has twice lately stated that terms to be implied are for the Court and not for the jury: *Comptoir Commercial Anversois* v. *Power, Son & Co.* (5); *Tournier* v. *National Provincial and Union Bank of England* (6), per Atkin L.J. Further, in my view, where the defendant has protection under a contract, it is not permissible to disregard the contract and allege a wider liability in tort: *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co.* (7), per Lord Cave, Lord Finlay and Lord Sumner.

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(1) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

(2) The words of Willes J. are that the invitee "is entitled to expect that the occupier shall . . . . use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and . . . . where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise . . . . must be determined by a jury as matter of fact." L. R. 1 C. P. 288.

(3) L. R. 4 Q. B. 379.

(4) (1863) 3 B. & S. 751.

(5) [1920] 1 K. B. 868.

(6) [1924] 1 K. B. 461, 483–485.

(7) [1924] A. C. 522, 533, 547, 564.

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What then is the term to be implied on payment to see a spectacle, the nature of which is known to all people of ordinary intelligence who go to see it? A large number of authorities were cited to us. In my opinion it is sufficient to start with the decision of the Exchequer Chamber in *Parnaby* v. *Lancaster Canal Co.* (1), approved by the House of Lords in *Mersey Docks Trustees* v. *Gibbs.* (2) Lord Wensleydale in that case expresses himself thus (3): "My Lords, the Court of Exchequer Chamber in both these cases founded its judgment on that of the Exchequer Chamber in the case of *Parnaby* v. *Lancaster Canal Co.* (1), in which case there was a company incorporated by Act of Parliament, for the purpose of maintaining a canal, to be opened for the use of the public on payment of rates which the canal company might receive for its own benefit (that is, the profits were to be divided amongst the shareholders), and the Court held that the common law imposed a duty on the proprietors not, perhaps, to repair the canal, or absolutely to free it from obstructions, but to take reasonable care so long as they kept it open for the use of all that might navigate it, that they might navigate it without damage to their lives or property. Of the propriety of this decision there could be no doubt, where the profits were received for the benefit of the company." This is not an absolute warranty of safety, but a promise to use reasonable care to ensure safety. What is reasonable care would depend on the perils which might be reasonably expected to occur, and the extent to which the ordinary spectator might be expected to appreciate and take the risk of such perils. Illustrations are the risk of being hit by a cricket ball at Lord's or the Oval, where any ordinary spectator in my view expects and takes the risk of a ball being hit with considerable force amongst the spectators, and does not expect any structure which will prevent any ball from reaching the spectators. An even more common case is one which may be seen all over the country every Saturday afternoon, spectators admitted for payment to a field to witness a football or hockey match, and standing along a line near the touchline. No one expects the persons receiving payment to erect such structures or nets that no spectator can be hit by a ball kicked or hit violently from the field of play towards the spectators. The field is safe to stand on, and the spectators take the risk of the game. The difference between dangers of the place and dangers of the entertainment is shown by the two cases of *Francis* v. *Cockrell* (1) and *Cox* v. *Coulson.* (2) In *Francis* v. *Cockrell* (1) the person taking payment for admission to a stand was held liable for the negligent and improper construction of the stand (though he did not know of it) whereby it fell. It would have been different if the stand was an uncovered stand and the person paying caught a bad cold through sitting in winter in such a stand. The stand would afford no protection against weather, but the spectator would have accepted the obvious risk arising from such lack of protection. In *Cox* v. *Coulson* (2) the defendant took money for admission to a theatre, where a travelling company were performing. A spectator was injured by a cartridge fired from a pistol. The county court judge laid down a principle on the lines of *Parnaby's* case (3), which the Court of Appeal held to be too wide. Swinfen Eady L.J. said (4): "The defendant must also be taken to have contracted to take due care that the premises should be reasonably safe for persons using them in the customary manner and with reasonable care: *Francis* v. *Cockrell* (1); *Norman* v. *Great Western Ry. Co.* (5) The defendant does not absolutely warrant the security of his premises: *Readhead* v. *Midland Ry. Co.* (6) He does, however, warrant, not only that there shall be due care on the part of himself and his servants, but also that there shall be due care on the part of any independent contractor who may have been employed by him in the construction or repair of the premises. The principle is that where a legal duty is incumbent on a person,

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(1) 11 A. & E. 223, 230.

(2) L. R. 1 H. L. 93.

(3) Ibid. 123.

(1) L. R. 5 Q. B. 501.
(2) [1916] 2 K. B. 177.
(3) 11 A. & E. 223.
(4) [1916] 2 K. B. 181.
(5) [1915] 1 K. B. 584.
(6) L. R. 4 Q. B. 379.

that duty is not discharged by employing a contractor who imperfectly performs it. This, however, only deals with the premises, and the accident did not happen through any defect in the premises. Is there, then, to be implied, in the contract between the plaintiff and the defendant, any term with regard to the play apart from the premises in which the play is to be performed? The play involved the use of firearms, and according to the evidence included a scene in which a wireless station was defended against an enemy; the performers were dressed as soldiers and were shooting with revolvers. Such a scene, properly performed and without negligence, would be free from danger, but injury would be likely to result from it unless care was taken in loading and using the firearms. The county court judge held that it was an implied term of the contract between the defendant and the playgoer that all persons connected with the performance of the play should exercise reasonable care so that the members of the audience should not be exposed to any danger which could be avoided by the exercise of such reasonable care. In my opinion this is too wide, and there is no authority and no principle upon which so extended a liability can be said to rest upon a person who, for reward, agrees that others shall enter his premises and witness the performance of a play there. Upon this footing the defendant would be liable for any negligence of the performers as if they were his servants"; and again, in a later passage, he says (1): "If there are incidents in a play which are intrinsically dangerous unless carefully performed, especially if they involve the use of firearms, and which the manager knew or ought to have known of, then, in my opinion, it is an implied term of the contract between the playgoer and the other contracting party that such contracting party will use reasonable care and diligence to see that such incidents are performed without risk to the playgoer. He is not, however, under liability for any accident which he could not have prevented by the exercise of reasonable care or supervision, but which happens through some carelessness or want of skill on the part of a member of the company. He does not warrant that there shall be no such negligence or want of skill. His liability is that of an invitor towards an invitee as expressed in *Indermaur* v. *Dames* (1) and in *Norman* v. *Great Western Ry. Co.* (2), per Buckley L.J.: 'The duty of the invitor towards the invitee is to use reasonable care to prevent damage from unusual danger which he knows or ought to know. If the danger is not such that he ought to know of it, his liability does not extend to it.'" I think to all these statements there must be added a term that there is no obligation to protect against a danger incident to the entertainment which any reasonable spectator foresees and of which he takes the risk.

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(1) [1916] 2 K. B. 183.

The learned judge, of whose summing-up no complaint is made, as it is obviously a summing-up in favour of the defendant Company, put two questions to the jury as against the Company. With due respect to him, I do not understand why two questions were put, as they appear to me to be substantially the same question. They were: "(1.) Did the defendant Company omit any and what reasonable precaution for the safety of the spectators?" to which the jury answered: "Yes. Failure to exhibit warning notices generally. Failure to increase height of barrier or number of barriers in view of the increased speed of cars. Failure to keep spectators at a safe distance from the track. Failure to realize that the position of the accident was the fastest part of the course and that special precaution was necessary." "(2.) Was the defendant Company guilty of any and what negligence whereby injury was caused to the plaintiff?" to which the jury answered: "Yes. The defendant Company being owners of premises used for the carrying on of a highly dangerous sport at which accidents had happened and were likely to happen by advertisement and otherwise invited the public to collect to witness a highly dangerous sport, and failed by notices or otherwise to give warning of or protection from the dangers arising from the sport, and as in answer to question No. (1.)." They further found the drivers of the two cars which collided were not guilty of negligence.

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(1) L. R. 1 C. P. 274; L. R. 2 C. P. 311. (2) [1915] 1 K. B. 584, 592.

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In view of the admitted facts, in my opinion there was no evidence to justify the answers of the jury. Considering the position of motors and motor racing at the present day, I cannot think it is a failure to use reasonable care or negligence not to inform spectators of a motor race that with cars running at a rate of 100 miles per hour there is a risk of cars skidding or leaving the track, especially when for twenty-three years no such car had reached a spectator. Again, when for the same period of time no car had broken through the railing, I cannot think that reasonable care required a strengthening of the barrier against a danger which had never happened in twenty-three years. The learned judge, in declining to enter judgment for the defendant Company, gave no reasons; I think his summing-up shows that he himself would not have given the same answers as the jury. The decision of the Lord Chief Justice in entering judgment for the owners of Ranelagh, where a polo pony ran through a hedge and injured a spectator, is in accordance with the result I have arrived at, though he also has not given reasons for his decision: *Pidington* v. *Hastings.* (1)

In my opinion the findings of the jury and the judgment for the plaintiff should be set aside and judgment entered for the defendant Company, with costs here and below.

GREER L.J. On Friday, May 9, 1930, the respondent (plaintiff in the action), then a student at the Royal Naval College at Greenwich, being the owner of an Alvis car, and consequently interested in the racing qualities of that make of car, went with some friends to see the races at Brooklands which were being run under the auspices of the Junior Car Club on the course occupied and managed by the defendants, the Brooklands Auto Racing Club. While watching one of the races he met with injuries, suffering damage which the jury have estimated at the sum of 988*l.* At the gate he paid 3*s.* for a ticket which entitled him to take up his position on any part of the ground except such parts as were reserved to members of the defendant club. There were no terms of contract expressed on the ticket, and the contract between him and the defendants is necessarily to be implied from the circumstances of the case. He took up his position to watch one of the races three or four yards from the railing two-thirds of the way along that part of the course indicated on the map, which was given in evidence by the terms "the finishing straight." The competitors in the race which he was watching drove their cars in a circuit round the course, which included the finishing straight. As the plaintiff was watching the race, a most extraordinary and unlikely event which no one would have anticipated happened. Four cars were concerned: a 7 h.p. Austin which was in front, an Alfa Romeo which was a little behind the Austin, a Talbot, No. 22, which was being driven very nearly in the wake of the Alfa Romeo, and at less than a car's length from it, and a second Talbot, No. 21, which was about the same distance behind the Talbot No. 22. According to the evidence called by the plaintiff, and given by Lord Howe, the first Talbot, No. 22, turned very suddenly, almost as if at right angles and as if it had braked suddenly, then the second Talbot, No. 21, hit the first Talbot on the off side of the scuttle, with the result that the leading Talbot seemed to leap right into the air, and then went through or over the railing, killed some people who were near the railing, and caused serious damage to the plaintiff and others. In cross-examination Lord Howe said: "I very much doubt whether any barrier or railing in the ordinary way would have prevented the accident occurring, because it seemed to me that the car was literally thrown through the air." Lord Howe is a well known racing expert and had been taking part in the race in question, but at the time was at the pits a little distance from where the accident happened. The plaintiff himself was unable to give any account as to how the accident happened, but he said in cross-examination that it never occurred to him that there might be danger, and that he never thought that the railings would be hit straight by the car. No other

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(1) Unrep. The Times Newspaper, March 12, 1932, p. 4.

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evidence was given on behalf of the plaintiff by persons who saw the accident as to the way in which it happened, so far as it is relevant to the case against the defendant Club, though evidence was given blaming the drivers of the cars for racing in the positions in which they were—so close together that they could not successfully deal with any emergency that arose. At the place where the accident happened there was a red line 17 feet from the kerb within which cars were expected to keep except when passing other cars. At the end of this 17 feet there was a kerb 6 inches high, and 4 feet 6 inches from the kerb there was a railing at which the public could stand. It was not expected by the defendants that cars would ever get beyond the railing. The railing was there for the purpose of keeping the spectators off the track. The plaintiff also called a Mr. Watson, an expert motor engineer and driver with thirty years' experience of driving and three years' experience of driving in races. In his view it was dangerous for the cars to be driven in the relative positions in which the three cars in question were being driven, at the pace at which they were driven, which was about 100 miles per hour, before they braked. There was, in his judgment, risk of skidding, of tyres coming off or bursting, steering going wrong, and of loss of control. He stated that in his opinion the rails were not strong enough to resist an attack by one of the cars at high speed; that the kerb was useless, and that he himself thought the place unsafe, and always stood on the hill at some distance away to watch the racing. No evidence was given on behalf of the plaintiff as to any previous accident at this part of the track, except by Lord Howe, who in cross-examination stated that on one occasion a car driven by Mr. Cook skidded and struck the rails but did not go through.

At the end of the plaintiff's evidence it was contended for the defendants that there was no evidence on which it could be held that the accident happened through any breach of duty by the defendants to the plaintiff. The argument was twofold: first, that the accident was of such an extraordinary character that it was not negligence on the part of the defendants to have failed to anticipate and provide against the kind of accident which happened on the day in question, and occasioned the damage of which the plaintiff complained; and secondly, it was contended that the defendants were not liable, because on the implied terms of the contract made by the taking of the ticket the plaintiff took the risk of such accidents as might conceivably happen notwithstanding that all usual precautions had been taken by the defendants. The learned judge declined to stop the case, and the defendants then called their witnesses.

The first witness was Mr. MacConnell, a mechanical and consulting automobile engineer employed by the defendants, who gave evidence to the effect that barriers were not usually provided on racing tracks, that this was the first accident at Brooklands at which a spectator was injured, that never before had a car gone off the track on the straight. By that I understand he did not mean that no car had ever got beyond the kerb, but that no car had ever got beyond the rails. He also said that if the car hit the rails at right angles no rail would stop it, nor if it hit the rails at an acute angle. He intimated that in his view cars might be so close together that if something happened they might be smashed up through sudden braking, swerving, or tyres coming off. The width of the track, he stated, at the point in question was 105 feet. He had never known of a single collision between two cars on the track, or of a wheel coming off, at Brooklands. He expressed the view that reasonable precautions had been taken for spectators, and that no barrier was reasonably required on the straight. Mr. Bradley, the clerk of the course, gave further particulars about the accident to Mr. Cook, who, he said, shot across the track and hit the railings, which bulged, but no one was hurt, and that in his experience he had only known of one spectator being injured, and that was a lady who walked across the track. Important evidence was given for the defendants by Mr. Sydney Davis with reference to the previous accidents. It seems that on the occasion of Mr. Cook's accident, and that to another car, a

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race of a special kind was taking place in which the cars had to turn rapidly round a tub and go back again towards the fork and then round again, but that he had never known or heard of an accident by a car striking the railings when it was making a straight drive down the finishing straight. In one of the cases Gordon England's Austin struck the kerb and the car turned over, remaining on the border without striking the rails. He described another accident to an Alvis, which was similar to Mr. Cook's, though apparently the Alvis did not do more than touch the rails.

There was evidence which the plaintiff much relied on of precautions that had been taken after the accident by putting up a barrier composed of sleepers close to the kerb, which would, of course, add to the power of the kerb to keep cars on the track, but in Mr. Davis's opinion it would have had no effect in preventing the accident which had happened to the plaintiff on the occasion when he was injured.

As the case which we are considering is one in which there was a contractual relationship between the plaintiff and the defendants, the first thing to be determined is what was the implied contract between the parties? There can be no doubt that this is a question of law for the Court, and not a question for the jury, there being no relevant facts in dispute: see *Comptoir Commercial Anversois* v. *Power, Son & Co.* (1) and *Tournier* v. *National Provincial and Union Bank of England* (2); see especially per Atkin L.J. (now Lord Atkin (3)). The judgment of Atkin L.J. in that page contains a compendious statement of the rules by which the Court should be guided. He says these are "contained in passages from the judgments of Lord Esher in *Hamlyn & Co.* v. *Wood & Co.* (4) and of Lord Watson in *Dahl* v. *Nelson, Donkin & Co.* (5), cited by Bankes L.J. (6) The principle is stated by Scrutton L.J. in words substantially to the same effect: 'The Court,' he says (7), 'and not the jury, are the tribunal to find such a term; they ought not to imply a term merely

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(1) [1920] 1 K. B. 838.
(2) [1924] 1 K. B. 461.
(3) Ibid. 483.
(4) [1891] 2 Q. B. 488.
(5) (1881) 6 App. Cas. 38.
(6) [1920] 1 K. B. 886–7.
(7) Ibid. 899–900.

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because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included; it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted.' " The decisions leave no doubt that in the contract which was made by the plaintiff there was an implied term that the defendants warranted not only that due care had been taken on the part of the defendants and their servants to make the place reasonably safe, but also that due care had been taken by any independent contractors whom they had employed to lay out the course on which these races took place: see *Francis* v. *Cockrell* (1); *Cox* v. *Coulson* (2); and *Maclenan* v. *Segar* (3), a decision of McCardie J., where the learned judge, after examining the cases, accurately states the law as follows: " Where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties (unless it provides to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of any one can make them. The rule is subject to the limitation that the defendant is not to be held responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair, or maintenance of the premises."

It is clear law that there is no absolute warranty that the premises are safe, but only that reasonable skill and care have been used to make them safe. But the question arises whether the term I have mentioned is the only term to be implied as between a spectator who takes a ticket to see a cricket match, a race, or other spectacle, which in certain events may be attended by a risk of danger. In my

(1) L. R. 5 Q. B. 501. (2) [1916] 2 K. B. 177.
(3) [1917] 2 K. B. 325, 332.

judgment both parties must have intended that the person paying for his licence to see a cricket match, or a race, takes upon himself the risk of unlikely and improbable accidents, provided that there has not been on the part of the occupier a failure to take usual precautions. I do not think it can be said that the content of the contract made with every person who takes a ticket is different. I think it must be the same, and it must be judged by what any reasonable member of the public must have intended should be the term of the contract. The person concerned is sometimes described as "the man in the street," or "the man in the Clapham omnibus," or, as I recently read in an American author, "the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves." Such a man taking a ticket to see a cricket match at Lord's would know quite well that he was not going to be encased in a steel frame which would protect him from the one in a million chance of a cricket ball dropping on his head. In the same way, the same man taking a ticket to see the Derby would know quite well that there would be no provision to prevent a horse which got out of hand from getting amongst the spectators, and would quite understand that he was himself bearing the risk of any such possible but improbable accident happening to himself. In my opinion, in the same way such a man taking a ticket to see motor races would know quite well that no barrier would be provided which would be sufficient to protect him in the possible but highly improbable event of a car charging the barrier and getting through to the spectators. The risk of such an event would be so remote that he would quite understand that no provision would be made to prevent it happening, and that he would take the risk of any such accident. I think Mr. Doughty was quite right in his argument before the learned judge in laying stress on the arguments based on the implied contract between the parties.

In my judgment there was an implied term in the contract between the plaintiff and the defendants under which the plaintiff agreed to take the risk of the kind of accident that happened in the present case, but if I should be wrong about this, I am prepared to hold that there was no evidence that the defendants failed to take reasonable care to make their premises reasonably safe for spectators. I do not think the defendants are under any obligation to provide safety under all circumstances, but only to provide against damage to spectators which any reasonable occupier in their position would have anticipated as likely to happen. I agree that they ought not to be held liable because after the event they took precautions which would prevent any argument in the future that after experience of an accident they would have failed in their duty if they had taken no additional precautions at all. In all probability the jury attached too much weight to the fact that after the accident these additional precautions were taken.

The jury's answer to the second question is based on a finding that the defendants failed to take reasonable precautions, by notice or otherwise, to protect the plaintiff from dangers arising from a highly dangerous sport. Having regard to the nature of the action, this must mean a sport highly dangerous to the spectators. Such a finding is not supported by the evidence in the case, but on the contrary is, in my judgment, directly in the teeth of the evidence. Since the course was opened for racing in 1907 up to the date of the accident in which the plaintiff was injured, races had been going on, and though obviously races at the high speed at which cars have been able to run in recent years are indeed highly dangerous to the competitors, there was no evidence whatever that such races had become highly dangerous to spectators watching the races in the part of the ground where the plaintiff stationed himself. Under these circumstances it does not seem to me that the jury were justified in finding that the accident to the plaintiff, and the damages that he suffered, were due to any want of reasonable care on the part of the defendants towards him, the defendants having for a long period of time had experience that the races could be carried on under the existing arrangements without any accident happening to any of the spectators, except in one case where it was due to the default of a spectator herself in wrongfully crossing the track. It seems to me that the jury were not entitled to find that there had been any breach of the defendants' duty to exercise by themselves, their servants, or by independent contractors, reasonable care to secure the safety of spectators in the position in which the plaintiff was at the time of the accident. No reasonable body of men could be expected to anticipate the extraordinary events that happened at the material time and led to consequences that could not reasonably be anticipated, that is to say, the mounting of a car on to and over the railings, in effect a car directly charging and jumping the railings and overturning among the spectators.

I am accordingly of opinion, for the reasons stated, that there was no evidence on which a jury could properly have found a verdict for the plaintiff, and judgment must be entered for the defendants, with costs here and below.

SLESSER L.J. In this case the plaintiff was an invitee for consideration to the Brooklands Racing Track and premises, of which premises the defendants, the Brooklands Auto Racing Club, were the owners. The defendants assume all liability for their lessees: my judgment is given on this assumption. The contract, so far as it was evidenced by the ticket of admission, contained no written terms. Its terms and implications are therefore to be considered by the Court: *Tournier* v. *National Provincial and Union Bank of England.* (1)

The facts of the accident which occurred on those premises and injured the plaintiff disclose a most unusual series of events. The accident took place on a part of the racing track known as the "straight," and the evidence which was given in the case shows that on only three previous occasions has a racing car met with an accident on that part of the track. In none of these was a spectator injured. In the present case, however, a motor-car, after coming in contact with another with which it was racing, left the track altogether, appears to have leapt into the air and, in the opinion of Lord Howe, was actually in the air for about a dozen yards and went over the top of some rails, which were by the side of the track. These rails, which were between the plaintiff and the track, had in the past, in two of the three previous accidents at this point, although not erected for the purpose, proved sufficient to keep the car from any spectators who might be standing by it. In the third case the car did not hit the rail at all, but in the present one the rail, being struck upon the top, collapsed; the car turned somersault and fell and killed or injured many people.

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(1) [1924] 1 K. B. 461.

The jury were asked questions at the trial as follows: "(1.) Did the defendant Company omit any and what reasonable precaution for the safety of the spectators? (Answer) Yes. Failure to exhibit warning notices generally. Failure to increase height of barrier or number of barriers in view of the increased speed of cars. Failure to keep spectators at a safe distance from the track. Failure to realize that the position of the accident was the fastest part of the course and that special precaution was necessary.

"(2.) Was the defendant Company guilty of any and what negligence whereby injury was caused to the plaintiff? (Answer) Yes. The defendant Company being owners of premises used for the carrying on of a highly dangerous sport at which accidents had happened and were likely to happen by advertisement and otherwise invited the public to collect to witness a highly dangerous sport and failed by notices or otherwise to give warning of or protection from the dangers arising from the sport, and as in answer to question No. 1."

Judgment was entered against these defendants for 988*l.* The defendants appealed.

In my opinion the liability in this case arises out of contract and, despite certain obiter dicta to the contrary, I think that it is the better opinion that even in cases where there are no higher terms expressly imported, where for reward persons are invited to use premises, the duty upon the invitors is higher than in the case where the action is merely founded in

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tort. The contrast is as follows: As regards cases like the present, where the action is founded in contract, I think that it is the duty of the invitors to show that degree of care stated by Tindal C.J. in *Parnaby* v. *Lancaster Canal Co.* (1), approved by the House of Lords in *Mersey Docks Trustees* v. *Gibbs* (2), to the following effect—namely, to take reasonable care that the public may use the premises without danger to their lives or property.

In the case of tortious liability, the obligation is, to quote Willes J. in *Indermaur* v. *Dames* (3), approved in the Exchequer Chamber (4), that the occupier of a building owes a duty to persons resorting thereto in the course of business upon his invitation to "use reasonable care to prevent damage from unusual danger, which he knows or ought to know." In the present case, the relation being contractual, I would apply the former of these tests and ask whether there was, in the circumstances, evidence on which the jury could find that the appellants have failed to take reasonable care that the plaintiff might use the premises without danger to life or limb.

This test of the obligation of the invitors on this basis appears to me to involve two considerations. First, the consideration whether the misadventure was of so unusual and unexpected a kind that it could not reasonably have been expected; and, secondly, whether, if it could have been so expected, the appellants have used that reasonable care which the law requires of them to see that the plaintiff might use the premises without danger. Even in cases of contract it must be remembered that the appellants are not insurers of absolute safety. In *Readhead* v. *Midland Ry. Co.* (5) it was said that "an obligation to use all due and proper care is founded on reasons obvious to all, but to impose on the carrier the burden of a warranty that everything he necessarily uses is absolutely free from defects likely to cause peril, when from the nature of things defects must exist which no skill can detect, and the effects of which no care or foresight can avert, would be to compel a man, by implication of law and not by his own will, to promise the performance of an impossible thing": per Montague Smith J. (1) The principle that an invitor or carrier does not warrant freedom from defects which no skill could detect applies equally to the case of an accident which no foresight could assume or guard against. In other words, whatever obligation there may be to guard against accident which may reasonably be assumed possibly to happen, there cannot be an obligation to guard against that which cannot reasonably be assumed to be likely to happen. Nemo tenetur ad impossibilia. If further authority be needed for this proposition, it is to be found in the case of *Cox* v. *Coulson* (2), where it was held that the defendant, the lessee of a theatre, owed the plaintiff, one of the audience, a duty to use reasonable care that she was not to be exposed to unusual danger, the existence of which the defendant either knew or ought to have known, but not to such risk of unusual danger as the defendant could not reasonably have anticipated. In the cases where the inquiry has been whether reasonable precautions have been taken against danger, it has always been assumed that the danger is one which the defendant either knew or ought to have known. Such is the case of *Brannigen* v. *Harrington* (3), a case of the collapse of the ceiling of a restaurant; *Welsh* v. *Canterbury and Paragon, Ld.* (4), a case where a tight-rope walker dropped a chair from the tight-rope upon the plaintiff's wife; *Lax* v. *Darlington Corporation* (5), where a cow belonging to the plaintiff attempted to jump a railing belonging to the defendants, the owners of a cattle market; all cases where the unusual danger was one which the defendants either knew or ought to have known might happen.

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(1) 11 A. & E. 223, 243.
(2) L. R. 1 H. L. 93.
(3) L. R. 1 C. P. 274, 288.
(4) L. R. 2 C. P. 311.
(5) L. R. 4 Q. B. 379.

Now in the present case no specific question was asked of the jury on this head. The nearest finding is that to the effect that the defendant Company, being owners of premises

(1) L. R. 4 Q. B. 384.
(2) [1916] 2 K. B. 177.
(3) (1921) 37 Times L. R. 349.
(4) (1894) 10 Times L. R. 478.
(5) (1879) 5 Ex. D. 28.

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used for the carrying on of a highly dangerous sport on which accidents had happened and were likely to happen, by advertisement and otherwise invited the public to collect and witness a highly dangerous sport. It may well be that the sport was highly dangerous and that accidents had happened and were likely to happen, but the evidence completely fails to show that any accident of the kind which gave rise to the injuries of the plaintiff in the present case had ever happened. Indeed, as I have already said, when accidents had happened on the "straight," the railings had proved a sufficient guard, and as to the finding that such an accident as the present was likely to happen, I can find no evidence on which the jury could have come to such a conclusion. All that is known is that since the opening of the track no such accident had ever happened. I do not think, however, that the jury intended to discriminate between one class of accident and another. They appear to have assumed that, the sport being dangerous, every kind of accident must be assumed to be a possibility, and this I think vitiates their finding when they come to consider whether the Company have omitted any and what reasonable precaution for the safety of spectators. "If the danger is not such that he" (the defendant) "ought to know of it, his liability does not extend to it": per Buckley L.J. in *Norman* v. *Great Western Ry. Co.* (1)

On the first essential question, therefore, I have come to the conclusion that there was no evidence that this unusual danger was one of which the defendants ought to have known; I doubt if the jury have specifically considered this question, but, in any event, my conclusion would lead to allowing this appeal.

As I have arrived at this conclusion, it becomes unnecessary to consider whether the precautions taken by the defendant Company for the safety of the spectators were or were not sufficient. If I am wrong in my view that the danger of a car leaping into the air over the railings was not one which the defendants ought to have anticipated, I think there was some evidence on which the jury would be entitled to find as they did and to say that the failure to increase the height of the barrier or number of barriers, to exhibit warning notices and to keep spectators at a safe distance from the track, would all be precautions which they might reasonably find to be necessary. Were I to be of opinion that the danger was one of which the defendants ought to have known, I should, I think, not have disturbed the finding of the jury. But no person can be under a legal obligation to guard against that which he has no legal duty to anticipate, unless, indeed, he is an insurer of the safety of his invitees. The authorities on this point admit of no doubt. The obligation is to guard against dangers which might reasonably be anticipated—not against all and every danger. I am of opinion that this appeal must be allowed.

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(1) [1915] 1 K. B. 584, 592.

Appeal allowed.

Solicitor for appellants: *Wm. Chas. Crocker.*
Solicitors for respondent: *Bryan O'Connor & Co.*
Solicitors for third party: *Ernest Bevir & Son.*

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Workmen's Compensation—Infant Workman—Accident—Declaration of Liability—Attainment by Workman of Twenty-one Years—Application to Employers to Review within Six Months of that Event—Application to Court to Review after expiration of Six Months—Effect of Declaration of Liability—Right to Review where no Weekly Payments ordered—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 11, *sub-s.* 2—*Workmen's Compensation Act*, 1926 (16 *&* 17 *Geo.* 5, *c.* 42), *s.* 1.

On September 19, 1929, an infant workman apprentice whilst in the employment of the employers met with an injury by accident to his eye. The employers paid him full compensation from the date of the accident down to March, 1930, when they took steps to terminate the weekly payments by making an application for an award by way of review. By consent of the workman an award was made for a declaration of liability in the form laid down in *King* v. *Port of London Authority* [1920] A. C. 1. The workman then obtained work as a traveller. On July 6, 1931, the workman attained the age of twenty-one years. On November 30, 1931, his articles of apprenticeship would have expired. On December 3, 1931, the workman's solicitor wrote to the employers' solicitors a letter in which he said: "I shall be glad to know whether your clients are prepared to pay my client compensation on the basis of partial incapacity." The parties having failed to come to an agreement as to the payment of compensation, the workman, on January 18, 1932, made an application to the Court for a review.

On appeal:—

Held (affirming the decision of the county court judge), that the letter of December 3, 1931, to the employers was an "application" for a review under s. 11, sub-s. 2, and was made within six months of the workman attaining twenty-one years, and that it was not necessary that such application should be made to the Court.

Powell v. *Main Colliery Co.* [1900] A. C. 366; and *Edward Curran & Co.* v. *Kays* [1928] 2 K. B. 469 applied.

Johnson v. *Sharp Bros. & Knight, Ld.* (1932) 25 B. W. C. C. 86 distinguished.

Held, also, that the effect of the award of the declaration of liability, even though that declaration did not provide for a nominal weekly payment, was to keep alive the rights of the workman, who could therefore apply for a review of weekly payments.

Wolseley Motors, Ld. v. *Sharp* (1925) 18 B. W. C. C. 15 followed.

APPEAL from an award of the judge of the Barrow-in-Furness County Court, sitting as arbitrator under the Workmen's Compensation Acts, 1925 and 1926.

The following statement of the facts is taken from the judgment of LORD HANWORTH M.R. :—

The workman, Thomas Regan, when nineteen years old, on September 19, 1929, suffered an injury by reason of an

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accident. At that time he was an apprentice driller. Apparently he had to drill holes in plates, which were in situ and above his head, and in the course of drilling some portion of metal drilled out, which by friction had become hot, struck his left eye and injured his sight. Compensation was at once paid to him by his employers on the basis of full liability for total incapacity at the time. At that time his average earnings were 25*s.* 5*d.* a week, and he was paid compensation at the rate of 18*s.* 10*d.* a week. That compensation continued to be paid to him from the date of the accident down to March, 1930. The employers then took steps to terminate these payments by making an application for an award, which is in the nature of a review. That application is dated February 19, 1930, and is expressed to be " an arbitration under the Workmen's Compensation Act, 1925 . . . . requested between Vickers-Armstrongs, Limited, and Thomas Regan with respect to the review and termination (or diminution, increase or redemption as the case may be) of the weekly payment payable to the said Thomas Regan under the said Act in respect of personal injury caused to him by accident arising out of and in the course of his employment." By his answer of March 1, 1930, the workman submitted to having a declaration of liability made: " Take notice that the respondent, Thomas Regan, desires to bring to the notice of the judge the following facts: (1.) That the respondent submits to an award reducing his compensation to a declaration of liability, and the applicants' solicitors were so informed by letter from the respondent's solicitor on the 18th Feb., 1930, and before the commencement of these proceedings. (2.) That the respondent admits that his original work of an apprentice driller was offered to him by the applicants, and says that he refused to return to such work on the ground that it is not suitable work," and so on. In consequence of that, at the hearing an order was made terminating the weekly payment as from March 13, 1930, and giving the workman a declaration of liability. That declaration of liability was in the form laid down by Lord Birkenhead in *King* v. *Port of London Authority* (1), and was in these terms: " It is hereby declared that the said respondent, Thomas Regan, has received an injury by accident arising out of and in the course of his employment, but inasmuch as the evidence has not established that at the date hereof the respondent is, as a result of such injury, incapacitated for work, but has on the other hand established that there is a reasonable probability that such incapacity may ensue, it is ordered that this arbitration do stand adjourned reserving to each of the parties hereto liberty to make such further application in the matter of this arbitration as they or he may be advised." As a matter of fact, the young man did not return to his employers' work as indicated in his answer, but became a traveller in some class of goods. The effect of the order made giving a declaration of liability is this, that the matter is for the moment undetermined and the arbitration stands adjourned, reserving to each of the parties liberty to make such further application as they or he may be advised. It is important to recall that the declaration of liability which was laid down by Lord Birkenhead was to be used in lieu of the device which up to that time had been followed of ordering the employers to pay the workman a penny a week in order to keep alive the rights of the workman. In fact, under the declaration of liability, no actual payment is to be made, but the arbitration stands adjourned. On July 6, 1931, the workman attained the age of twenty-one years, but the time of his apprenticeship had not then expired, and he was during that time entitled to receive from his employers a certain sum and no more, and that with what he was able to earn was slightly more than he could have secured from these employers. There was, therefore, no justification for him to make any claim upon them under the declaration of liability. His articles terminated on November 30, 1931, and on December 3, 1931, a letter was written by his solicitor to the employers' solicitors as follows: "Thomas Regan and Vickers-Armstrongs, Ltd. You will remember this matter was before the Court in March, 1930, when an award was made for a declaration of liability. My client informs me that he would have been out of his time on the 30th ultimo and also that he attained the age of twenty-one years on the 6th July last. I shall be glad to know whether your clients are prepared to pay my client compensation on the basis of partial incapacity." That I hold as a matter of construction was a definite claim made by and on behalf of the workman for an adjustment of the liability confessed by the employers, based on the fact that he was no longer paid the smaller wage which prevailed, or would have prevailed, until November 30, previously. In consequence of the parties being unable to agree and pay any weekly compensation to the workman, on January 18, 1932, notice of intention to apply to the Court was given on behalf of the workman by his solicitor. It is headed "In the matter of the Arbitration," and is in the following terms: "Take notice that .... we intend to apply for an increase of the weekly payment payable to the said Thomas Regan as from the 6th July, 1931, to such amount as to the Court may seem just on the grounds that the said Thomas Regan attained the age of twenty-one years on the 6th July, 1931, that his apprenticeship would have been completed but for his accident and that he is partially incapacitated for work as the result of his injuries." That application was made in reference to the adjourned arbitration. The application came before the county court judge on February 26, 1932. Evidence was then given, and the learned judge made an award that the workman was entitled to an increased sum under the terms of s. 11, sub-s. 2, of the Act of 1925.

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(1) [1920] A. C. 1; 12 B. W. C. C. 260.

The employers appealed on the grounds that the judge was wrong in law in holding: (1.) that the application of the workman of January 18, 1932, was not an application for review within the meaning of s. 11, sub-s. 2, but was a restoration of the original proceedings in the same Court between the parties; (2.) upon the facts that the application was not out of time; (3.) that the liberty reserved by his former decision could render effective an application otherwise out of time; and (4.) that the employers were liable to make weekly payments to the workman by way of compensation calculated upon the basis provided by s. 11, sub-s. 2, although

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the provisions of that section had not been complied with.

The appeal was heard on June 13 and 14, 1932.

Derbyshire K.C. and *Harold Broadbent* for the appellants.

F. W. Beney for the respondent.

The arguments sufficiently appear from the judgments.

LORD HANWORTH M.R. [stated the facts as above set out and continued:] It must be remembered that s. 11, sub-s. 2, of the Act of 1925 has now been amended by s. 1 of the Act of 1926, and as so amended is as follows: "Where the workman was at the date of the accident under twenty-one years of age and the review takes place more than six months after the accident and the application for the review is made before or within six months after the workman attains the age of twenty-one years, the amount of the weekly payment may be increased to such an amount as would have been awarded if the workman had at the time of the accident been earning the weekly sum which he would probably have been earning at the date of the review if he had remained uninjured." A point is taken on behalf of the employers that there is no application for a review made within six months after the workman attained the age of twenty-one years; the application, they say, was not made until January 18, whereas the six months elapsed on January 6. After careful consideration I have come to the conclusion that this preliminary point, as I may call it, does not prevail. It is to be observed that it is an application for a review and what we have to consider is: Is that application one which is to be made to the Court, or is it one which is to be made to the employers? In *Powell* v. *Main Colliery Co.* (1) Lord Halsbury expressly pointed out that the claim for compensation, which we all know is required under s. 14 of the Act, means not the initiation of proceedings before the tribunal by which the compensation is to be assessed, but a notice of claim for compensation sent to the workman's employer. I need not refer to the

(1) [1900] A. C. 366.

speech of Lord Halsbury at length, but it is plain from the arguments to which he refers that the Act is not to be interpreted strictly except where its terms are explicit, and that a claim in a form which is sufficient to give a notice to the employer is adequate to comply with the Act. There are a number of cases which show that such a claim need not be explicit as to its amount or the like. With that reasoning before us I think it would be unfortunate if we were to say that the application referred to in s. 11, sub-s. 2, of the Act of 1925 as amended is to be strictly interpreted.

In *Edward Curran & Co.* v. *Kays* (1) I pointed out that a question may arise whatever proceedings have been taken by the parties, and that by s. 21 provision is made for settling such a question by agreement without an application to the Court, and I actually came to the conclusion, under s. 11, that there was in that case an application by the workman fulfilling the conditions which are laid down in the sub-section, although the claim was not one to the Court, but was a claim to the employers. I think the point taken was necessary for the decision, and that the Court intended to decide it. Russell L.J., as he then was, expressly added a word or two upon this point. Dealing with the question of the letter written by the father of the workman, he said (2): "In my opinion the letter written by the father on August 8, in which he threatens to go to the Court in order, as he says, 'to ask the compensation justice to grant my son a living wage for life,' can only have been understood by the employers to mean that he was threatening to go to the Court to get the amount of compensation payable under the Act increased beyond the then existing sum. The only answer to that letter was to increase the payments to the young man to 27*s.* 6*d.* a week. In my opinion that amounts to a review by agreement within the meaning of s. 11 of the Act"; that is to say, there was an application for a review and the determination of that question by agreement, but I think Lord Russell means none the less to hold that it was a sufficient compliance with the Act that

(1) [1928] 2 K. B. 469.

(2) [1928] 2 K. B. 484.

the question which then arose upon that application was terminated by an agreement. That decision is binding upon us, and I am glad that it is. I should decide the matter in the same way after reconsideration, and after the advantage of having heard the argument of Mr. Derbyshire for the appellants, for it seems to me that it would be going back upon a number of decisions if we were to hold that there must be an application to the Court before s. 11, sub-s. 2, of the Act can be put into force.

Then there is a case which has been cited to us by Mr. Derbyshire of *Johnson* v. *Sharp Bros. & Knight, Ld.* (1) It is fair to say as to that case that so far as my recollection goes the question now before us was not there brought to our attention or argued. But I do not think that that case covers the present point. What we were there considering were certain negotiations which took place between the employers' insurers and the applicant's solicitor with a view to getting a sum for redemption of the payments payable to the workman. In that case the parties were different and the nature of the matter for discussion was different, and I do not think that case in any way compels us in a case, where we have, as here in the letter that I have already read, an explicit application for compensation—" to find out what your clients are prepared to pay as compensation "—to come to a decision other than that to which I have come to in the present case. It seems to me, therefore, that the applicant was not debarred by failure to comply with that condition as to time from making his application for a review.

But then, it is said that there was at the time no weekly payment which could be reviewed. In regard to that, I think we must not forget the point to which I have already called attention—namely, that the making of a declaration of liability is in lieu of the practice of recording an agreement to pay a penny a week; it is intended to keep alive the rights of the workman. If a case may be usefully referred to here, I would call attention to *Wolseley Motors, Ld.* v. *Sharp* (2), where there was a liability to pay, and then the employers commenced fresh arbitration proceedings by way of review to diminish the weekly payment under the agreement on the ground that the workman was able to earn full wages. Objection was taken by the workman that, under Sch. I., para. 16, of the Act of 1906, no case had arisen giving any right of review, as no question had arisen between the parties, and that there could only be a review of a weekly payment in existence—and it was held that, although no weekly sum was being paid by the employers to the workman, there existed a liability in respect of the accident and there had been an agreement registered, the terms of which were not at the time being fulfilled, because the workman was capable of working and was in fact at work; in other words, that the actual payment in coin or money to the workman was not the condition precedent to the review. The declaration of liability keeps open the rights between the parties. The proceedings are adjourned in order that whatever rights are available shall be put in suit at the right time, reserving to each of the parties liberty to make such further application as he or they may be advised. When the workman here had attained twenty-one years, and when his articles of apprenticeship had run out, he had acquired a right to come to the Court for the benefits given to him under s. 11, sub-s. 2, of the Act, freed from any difficulty as to time, and he made that application to the Court which has been dealt with, and rightly dealt with, by the county court judge. I think, therefore, that on both grounds the appeal fails and must be dismissed with costs.

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(1) 25 B. W. C. C. 86.

(2) 18 B. W. C. C. 15.

SLESSER L.J. In this appeal the respondent, who was an infant at the earlier stages of the proceedings, relies upon s. 11, sub-s. 2, of the Act of 1925, as amended by s. 1 of the Act of 1926. In order to rely upon that section, in the first place it is required that the workman, when applying for a review of any weekly payment, shall make an application for the review before or within six months after he attains the age of twenty-one years. It is said here that the workman failed to make such an application within the prescribed time, and, if the words "application for the review" are to be taken to be limited to a formal application before the Court for review, that contention would be correct; but Mr. Beney, for the respondent, has argued, and the county court judge has decided, that those words have a wider denotation. It is said, as I understand the argument, that the word "application" really in substance must be treated like the word "claim" in s. 14 of the principal Act. It has been pointed out by Lord Halsbury in the House of Lords, at the very initiation of this legislation in 1900, in *Powell* v. *Main Colliery Co.* (1), "that the statute deliberately and designedly avoided anything like technology"; and he said: "I should judge from the language and the mode in which the statute has been enacted that it contemplated what would be a horror to the mind of a lawyer, namely, that there should not be any lawyers employed at all." If that was what was intended by the statute I do not think that intention has been fulfilled, if I may say so. Lord Halsbury then went on to say that the Legislature avoided any technical phrases. The House of Lords there came to the conclusion that the word "claim" in s. 14, as it now is, of the Act of 1925, did not mean a claim in legal proceedings, but included a claim by a workman which, in the language of Lord Sterndale in *Craig* v. *Crypto Electrical Co.* (2), brought to the mind of the employers that a claim was being made. In my opinion, the word "application" in the Act of 1926 must be given the same liberal construction, and I think this Court has already decided that point in *Edward Curran & Co.* v. *Kays.* (3) Mr. Derbyshire has said that the observations in that case were obiter, but, whether they were so or not, I am clearly of opinion, now that the matter has directly to be decided, that an application made to an employer which would constitute a claim, if the word "claim" had been used in the Act of 1926 and not the word "application," is sufficient to satisfy the section. It is not necessarily the case that an application for a review will be an application in an existing proceeding. It was so in the present case, but where a workman has while an infant been receiving payments from an employer without arbitration, it may well be that under s. 11, sub-s. 2, of the Act of 1925 an application will be made for the first time for a review.

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(1) [1900] A. C. 366, 371.
(2) (1922) 15 B. W. C. C. 71.
(3) [1928] 2 K. B. 469.

Mr. Derbyshire's next point was this. He says: Be it so that this application might have been an application to the employers, yet the letter of December 3, upon which the respondent relies, was not even a claim within the meaning of *Powell's* case (1) and the other cases which have dealt with claims. He says that it does not, within the meaning of Lord Sterndale's test, bring to the mind of the employers that a claim was being made. In *Craig* v. *Crypto Electrical Co.* (2), there is set out the letter which was held by this Court to constitute a claim, reversing the county court judge, who had made an award in favour of the employers on the ground that there was no claim. That letter, after setting out the facts of the particular case, ends thus: "We have given you formal notice of the above facts, and shall be glad to hear from you what you propose doing in the matter." The language of the letter in the present case is as follows: "I shall be glad to know whether your clients are prepared to pay my client compensation on the basis of partial incapacity." Except for the fact that the present case is rather more detailed, in so far as it limits inquiry to the question of partial incapacity, I can see no difference in principle between the two cases, and I think it was quite open to the county court judge on the facts (because if there is evidence it is a question of fact, as Lord Sterndale said in *Craig's* case (2)) to find that there had been a claim here, which he must have found in order to find for the respondent.

That concludes that part of the case which is concerned with the question of the application being out of time, but there remains another problem, which perhaps has not been so fully argued, that has given me some difficulty, although I have now arrived at a clear conclusion on the matter. The problem is this. Sect. 11 is dealing with the review of weekly payments. The opening governing words of sub-s. 1 are: "Any weekly payment may be reviewed." In the present case, strictly speaking, there was no weekly payment to be reviewed. The declaration that was made on the earlier occasion, which my Lord has read, and which is in the form suggested by Lord Birkenhead and Lord Atkinson in *King* v. *Port of London Authority* (1), did not provide for the payment of a penny a week, which would have been a weekly payment, and if the view urged were to prevail the absurdity would arise that if a payment of a penny a week were made it would be a weekly payment which might be reviewed under s. 11, whereas if the declaration were to take the form prescribed by the House of Lords in *King* v. *Port of London Authority* (1) there would not be any weekly payment to review. Fortunately, however, I do not think we are driven to any such absurdity. There are two authorities, I think, which entitle one to treat a declaration, even where there is no express mention of a weekly payment, as one of a continuing payment of a notional weekly wage. One of those cases, a Scottish case, *Wilson* v. *William Baird & Co.* (2), is perhaps more in point than the] English case, because in that case, unlike the later English case to which I will refer, there was no recorded agreement at all. A boy, having received weekly payments from his employers, was taken back into employment, although still partially incapacitated, and the weekly payments, without any agreement on his part, were stopped. He was subsequently dismissed, and thereupon brought proceedings under what was then Sch. I. (16)—(now s. 11)—for review. In that case it was on the face of it not at all clear that there was in any sense a weekly payment, because there was not even existing a recorded agreement under which a liability for a weekly payment might arise; but the Court of Session were unanimously of opinion that nevertheless the arbitrator was entitled to review the weekly payments formerly made, although there had been a hiatus in the making of the weekly payments. Lord Cullen says (1): "The weekly payment under the agreement had been de facto in abeyance for a number of years owing to the workman having taken employment in substitution, but it had never been put out of existence legally." The other case, which I need not quote, as my Lord has already referred to it, *Wolseley Motors, Ld.* v. *Sharp* (2), followed the same language, my Lord saying (3) that the weekly payment was in abeyance, but had never been put out of existence legally, quoting from *Wilson* v. *William Baird & Co.* (1), which was a case where there had been an agreement. The present case seems to me to go a little further than either of those two authorities, because in those cases at one time or another there had been actually a weekly payment made, and here, at any rate from the time of the date of the declaration, the workman was unable owing to the amount of money which he was entitled to receive, for a time to claim any incapacity in spite of the injury to his eye, the declaration being limited to a right to treat the matter as adjourned and preserving to both parties all their rights; but in so far as the workman had at some stage before the declaration been paid compensation at the rate of 18*s.* 10*d.* a week, I think that here, as in the two cases which I have cited, it is right to say that the payment was in abeyance owing to the operation of the declaration, and that the workman on attaining the age of twenty-one years (the change of circumstances having occurred which is contemplated by s. 11, sub-s. 2) was entitled to come to the Court and ask for a review of that weekly payment which had been in abeyance. I think, therefore, that that objection also fails, and for these reasons; because the application was in time and because the matter was one competent for the county court judge to deal with under s. 11, I am of opinion that this appeal must fail.

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(1) [1900] A. C. 366.

(2) (1922) 15 B. W. C. C. 71.

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(1) [1920] A. C. 1.

(2) (1922) 16 B. W. C. C. 284.

ROMER L.J. I agree, and I desire only to add this. My recollection agrees with that of the Master of the Rolls in reference to *Johnson* v. *Sharp Bros. & Knight, Ld.* (4) and that is that there was no argument addressed to us upon the question whether the claim made on behalf of the workman in that case was an application within the meaning of s. 11, sub-s. 2, of the Act of 1925. If, however, my recollection is wrong upon that point, then it necessarily follows that we must have decided the question, and decided it as one turning on the particular fact in that case that the claim had not been made against his employer. It is not therefore and cannot be, an authority in any way inconsistent with the decision of this Court in *Edward Curran & Co.* v. *Kays.* (1)

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(1) 16 B. W. C. C. 290.
(2) 18 B. W. C. C. 15.
(3) 18 B. W. C. C. 19.
(4) 25 B. W. C. C. 86.

Appeal dismissed.

Solicitors for appellants: *Burton, Yeates & Hart, for Hart, Jackson & Sons, Barrow-in-Furness.*

Solicitors for respondent: *Bell, Brodrick & Gray, for Pickavance & Heron, Barrow-in-Furness.*

(1) [1928] 2 K. B. 469.

W. I. C.

WATSON'S TRUSTEES *v.* WIGGINS.

K. B. D.
1932
March 16, 17.
C. A.
July 25.

Revenue—Income Tax—Settlement—Covenant by Settlor to pay Annuity in Trust for Child during Joint Lives—Power to Settlor to revoke Trust with Consent of another Person—Annuity, whether for Period less than Life of Child or Settlor—Income of Child for computing Allowances and Deductions from Income Tax—Finance Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 20, *sub-s.* 1.

By a settlement dated March 5, 1930, the settlor covenanted with trustees that he would during the joint lives of himself and his son pay to the trustees an annuity of which they should stand possessed in trust for his son, and so that during his minority they should have power to apply it for the son's maintenance, education and benefit, and to accumulate any income not so applied, Provided that the settlor might with the consent of any one of several specified persons revoke the trusts declared by the settlement. The settlor paid to the trustees certain instalments of the annuity, deducting from each instalment income tax at the current rates. The power of revocation had not been exercised:—

Held (affirming Rowlatt J.'s decision), that the power of revocation reserved by the settlement did not render the annuity payable " for some period less than the life of the child " within the meaning of the Finance Act, 1922, s. 20, sub-s. 1; but that the instalments of the annuity when paid were income of the son as beneficiary, and should be so treated for the purpose of computing the allowances and deductions from income tax in respect thereof.

CASE stated by the Commissioners for the General Purposes of the Income Tax acting for the division of West Brixton in the county of Surrey.

By an indenture of settlement dated March 5, 1930, and made between Frederick Percy Watson (hereinafter called " the settlor ") of the one part, and Bernard Burton, Gordon Dabell and Shirley Worthington Woolmer (hereinafter called " the present trustees ") of the other part, after reciting that the settlor was desirous of making the provision thereinafter contained for his son, Francis Greville Melmose Watson, who was born on November 26, 1916, the settlor covenanted with the present trustees that he would during the joint lives of himself and his son pay to the present trustees or the survivor of them or others or other the trustees or trustee for the time being of the settlement an annuity of 350*l.* to be paid by equal quarterly instalments on the usual quarter days the first instalment or proportion of instalment

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to be paid on March 25, 1930: And it was thereby declared that the present trustees or the survivor of them or other the trustees or trustee for the time being should stand possessed of the annuity in trust for the settlor's son and so that during his minority they should have the same power of applying such annuity for or towards his maintenance education and benefit as they would have if the annuity were income of property vested in the trustees upon trust for the settlor's son for an absolute interest: And it was further declared that so long as the law allowed the trustees should accumulate and invest any income not so applied by them as aforesaid in any trust securities for the time being but with power at any time to resort to such accumulations and to apply the same as though they were current income: Provided always that the settlor might at any time or times thereafter by deed or deeds revocable or irrevocable with the consent of any one of the following persons that was to say the present trustees the said B. Burton, G. Dabell, and S. W. Woolmer, or Aubrey Arthur Woolmer (since deceased) and Kenneth Amos revoke in whole or in part the trusts and powers declared by and contained in the settlement and appoint any new or other trusts powers and provisions in lieu thereof: And provided that nothing in the settlement contained should make it obligatory on the trustees to take action to enforce the covenant by the settlor therein contained unless and until special notice had been given to the trustees by or on behalf of the beneficiaries and reasonable security had been given to them for the costs of any such proceedings.

During the year ended April 5, 1931, the settlor duly paid to the present trustees the instalments of the annuity payable during that year under the settlement, these instalments amounting in all to the sum of 350*l*. There was deducted by the settlor from each instalment so paid income tax at the rate of 4*s*. 6*d*. in the pound, amounting in all to 78*l*. 15*s*., the net sum of 271*l*. 5*s*. being received by the present trustees. In addition, for the period from March 5, 1930, the date of the settlement, to March 26, 1930, the settlor duly paid to the present trustees the proportion of the instalment due

March 25, 1930, amounting to the sum of 19*l.* 8*s.* 10*d.*, and deducted therefrom the sum of 3*l.* 17*s.* 9*d.* income tax at the rate of 4*s.* in the pound, the net sum of 15*l.* 11*s.* 1*d.* being received by the present trustees. It was not disputed that the instalments so paid were paid by the settlor out of profits and gains brought into charge to tax in his hands, or that, subject to the question arising in this case, the sums deducted for income tax from these instalments were lawfully deducted.

On July 15, 1931, on behalf of F. G. M. Watson, the present trustees lodged a claim under the relevant statutory provisions relating to income tax with Mr. G. P. Wiggins, H.M.'s Inspector of Taxes (hereinafter called "the respondent"), for relief from and repayment of income tax for the year ended April 5, 1931, by reference to the tax so deducted as aforesaid from the instalments of the annuity paid to the present trustees during that year, on the footing that these instalments were income of the minor F. G. M. Watson.

On October 8, 1931, the respondent made objection to this claim upon the ground that that income must be regarded as the income of the settlor and not of F. G. M. Watson, in that it was payable for some period less than the life of F. G. M. Watson within the meaning of the Finance Act, 1922, s. 20, sub-s. 1 (*c*). (1)

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(1) Finance Act, 1922, s. 20:

"(1.) Any income—

(*a*) of which any person is able, or has, at any time since the fifth day of April, 1922, been able, without the consent of any other person by means of the exercise of any power of appointment, power of revocation or otherwise howsoever by virtue or in consequence of a disposition made directly or indirectly by himself, to obtain for himself the beneficial enjoyment; or

(*b*) . . . . or

(*c*) which by virtue or in consequence of any disposition made, directly or indirectly, by any person after the fifth day of April, 1914, is payable to or applicable for the benefit of a child of that person for some period less than the life of the child;

shall, subject to the provisions of this section, but in cases under the above paragraph (*c*) only if and so long as the child is an infant and unmarried, be deemed for the purposes of the enactments relating to income tax (including super-tax) to be the income of the person who is or was able to obtain the beneficial enjoyment thereof, or of the person, if living, by whom the disposition was made, as the case may be, and not to be for those purposes the income of any other person.

. . . .

Provided also that—

(i) the above paragraph (*c*) shall not apply as regards any income

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Against this objection the present trustees appealed to the General Commissioners.

On November 17, 1931, the appeal was heard by the General Commissioners.

At that date the settlor had not exercised the power of revocation reserved to him, either wholly or in part.

The following contentions (inter alia) were advanced on behalf of the appellants before the Commissioners: (1.) That the instalments paid under the settlement were income of the beneficiary for the year of claim and were not income of the settlor. (2.) That the fact that a power to revoke, not exercised, with consent of the persons named in the settlement was reserved to the settlor did not prevent the income from being income of the beneficiary. (3.) That the claim should be allowed.

On behalf of the respondent it was contended (inter alia): (1.) That by reason of the power of revocation the annuity was payable to or applicable for the benefit of F. G. M. Watson for some period less than his life. (2.) That by reason of the power of revocation the annuity was not payable to or applicable for the benefit of F. G. M. Watson during the whole period of the life of the settlor. (3.) That the annuity must be deemed to be the income of the settlor and not the income of F. G. M. Watson. (4.) That the claim should be refused.

The Commissioners, having considered the facts and arguments adduced before them, dismissed the appeal.

Afterwards, at the request of the appellants, the Commissioners stated a case for the opinion of the High Court.

No question of figures was involved in the case, the sole question upon which the opinion of the Court was desired

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. . . . which is payable to or applicable for the benefit of a child during the whole period of the life of the person by whom the disposition was made; and

(ii) for the purposes of the said paragraph (c) income shall not be deemed to be payable to or applicable for the benefit of a child for some period less than its life by reason only that the disposition contains a provision for the payment to some other person of the income in the event of the bankruptcy of the child, or of an assignment thereof, or a charge thereon being executed by the child."

being whether the sums received by the present trustees under the settlement during the year ended April 5, 1931, were income of the minor F. G. M. Watson for the purpose of computing the allowances and deductions to which the minor was entitled under the relevant statutory provisions for that year.

A. M. Latter K.C., *Gavin Simonds K.C.*, and *Cyril King* for the appellants.

Sir Thomas Inskip A.-G., *J. H. Stamp*, and *Reginald Hills* for the respondent.

1932. March 17. ROWLATT J. I do not think I can support this decision of the Commissioners. The question raised cannot be solved by paraphrasing the material section of the Finance Act, 1922, and then applying it to a paraphrase of the provisions of this deed. Nor are we helped by considering whether a disposition otherwise framed, but having the same financial or fundamental value as that in question, would be within the words of this Act.

What has to be ascertained is whether the Revenue Authorities can show—not whether the subject can show the contrary—that what has been done by the settlor, in the way in which it has been done, falls within the exact words of s. 20, sub-s. 1 (*c*), of the Act. The clause speaks of any income which by virtue or in consequence of any disposition made directly or indirectly by any person "*is*"—I lay some stress upon the word "is"—"payable to or applicable for the benefit of a child of that person for some period less than the life of the child." At the present moment this income certainly is payable to the child for his whole life, or at least for the life of himself and his father.

What Mr. Stamp, on behalf of the Crown, has pressed upon me is that in proviso (i) and proviso (ii) of the second set of provisoes to sub-s. 1 there are particular exemptions which show (so Mr. Stamp says) that, but for the exemptions, cl. (*c*), which we are construing, would apply to a case where the income is payable to the child for a period which may be less than the life of the child. I am not sure that those provisions ought not to be regarded as merely put in, as the phrase goes, ex abundanti cautela; that is to say, in order to make sure that no question shall arise on a case, in circumstances which occurred to the draftsman as possibly raising a doubt, which it was not intended to include. On that footing it would not be right to say that the expression of those exemptions founds an argument against allowing an extended meaning to the governing clause in circumstances not mentioned in the exemptions.

I think, however, that there is another ground on which that argument can be displaced. I do not think the exemptions referred to deal with circumstances quite in the same plane as the circumstances with which we have to deal. The exemptions deal with events working a defeasance within the limits of the limitation itself. The limitation stands unless bankruptcy or assignment or the death of the father or something equivalent intervenes which may shorten the limitation as it stands. It is all very well to say that a power of revocation is a kind of limitation, but that is not quite how it is put, and when you have a power of revocation exercised it gets rid of the limitation. The power of revocation not up to the present having been exercised, I do not think it can be said that the income is payable for a less period than the life of the child. In my view, as matters now stand, it is not true to say that this income is payable for a less period than the life of the child. It is payable for the life of the child. It may be that the deed under which it is payable may be altogether torn up by the exercise of the power of revocation. That power is dealt with in another sub-section which will not hit this case. In all the circumstances I am of the opinion that at the present moment I am not in a position to say that this case is within cl. (*c*). The appeal must, therefore, be allowed with costs.

Appeal allowed.

J. R.

The Inspector of Taxes appealed. The appeal was heard on July 25, 1932.

Sir Thomas Inskip A.-G., *J. H. Stamp* and *Reginald Hills* for the appellant. The income is here applicable for the benefit of the settlor's son or for a less period than his life by reason of the inclusion in the settlement of the power of revocation. It must therefore be treated as the income of the settlor under the Finance Act, 1922, s. 20, sub-s. 1. Having regard to proviso (i) to that sub-section, it is not suggested that the fact that the disposition is for the joint lives of the settlor and his son takes it outside the sub-section. Proviso (ii) to the sub-section, which protects cases of defeasance on bankruptcy, assignment or charge of a child of the settlor, shows that it is not intended to allow any other case of a defeasible life interest to be protected from the effect of the sub-section. Para. (*a*) of sub-s. 1 is not intended to apply to the case of a settlement on the child of a settlor, and cannot therefore be taken to limit cases where the inclusion of a power of revocation brings them within the sub-section to those where it can be exercised "without the consent of any other person." It cannot be contended that from a practicable point of view a person with a revocable life interest has an interest for his life. The question must be looked at as one of substance. The decision of Rowlatt J. in this case was not followed in *Levitt* v. *Inland Revenue Commissioners* (1), which came before the Court of Session on June 8, 1932.

Latter K.C., *Gavin Simonds K.C.*, and *Cyril King* for the trustees were not called upon.

LORD HANWORTH M.R. [after stating the facts :] We have to consider whether or not by virtue of s. 20 of the Finance Act, 1922, the income provided by the father for his son, and paid over to the trustees for his son, is the income of the father.

It is said by Mr. Stamp, and quite rightly, that in these tax matters the practice of the Courts is to look at the substance of the matter. For example, no trader is excused from paying the tax due in respect of his trade by reason of the fact that he has wrongly attempted to make a charge upon capital of something that ought to be charged to revenue; and, equally, no trader is to be prejudiced by reason of the fact that he has improperly attributed to revenue something which is really a capital charge. We have to look at the substance of the matter and regard it in a practical way, and the appellant in this case says that, looked at from the practical point of view, this settlement is a device whereby income, which is really the father's income, is passed over to the trustees for the son, and the indication that it is the income of the father is the fact that power is reserved to the father under a proviso contained in the settlement to revoke the trusts of the settlement. That proviso is in these terms: "Provided always that the settlor may at any time or times hereafter by deed or deeds revocable or irrevocable with the consent of any one of the following persons"—and then come five persons' names, three being the trustees and the other two outside persons—"revoke in whole or in part the trusts and powers declared by and contained in these presents." It is said by the appellant that a deed which is revocable with the consent of any one of five persons does not stand good, and is a strategem whereby money, that is really the income of the father, is ineffectively set aside for the son. We have, therefore, to look at s. 20. In my view the difficulty in regarding this question from what may be called a practical point of view, or a broad point of view, is the very meticulous nature of s. 20, which provides with precision for a great number of events, and does not boldly and baldly say that such a provision as is made by this deed is one which, for the purposes of income tax, is ineffective to transfer income from the settlor to the beneficiary. The catch-words to this section are imperfect and incomplete. The catch-words say: "Income under revocable and certain other dispositions to be treated as income of disponor." That is not what the section says. It is income under dispositions which are revocable in certain cases that may be treated as income of the disponor. First of all, let me look at para. (*a*) of sub-s. 1. It deals with any income "of which any person is able, or has . . . . been able, without the consent of any other person by means of the exercise of any power of appointment, power of revocation or otherwise howsoever by virtue or in consequence of a disposition . . . . to obtain for himself the beneficial enjoyment." However much we may desire to have regard to the substance of the matter, we cannot sweep away words out of an Act of Parliament, and it is plain that para. (*a*) deals only with powers of revocation which can be exercised without the consent of any other person. That paragraph admittedly does not apply to this deed, because the power of revocation in this deed cannot be made effective except with the consent of one of five persons. Para. (*a*), therefore, does not avail the Crown but it only leaves this mark behind it, that there is great precision in that part of the sub-section dealing with revocable dispositions.

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(1) Unreported. Since reported 1932 S. C. 629.

I come then to para. (*c*), which relates to any income "which by virtue or in consequence of any disposition made, directly or indirectly, by any person after" a certain date "is payable to or applicable for the benefit of a child of that person for some period less than the life of the child." That deals with the case where the income does not continue for the whole life of the child. I turn then to the settlement in this case to see whether under it income is payable for the whole life of the child. I find that it is only payable during the joint lives of the father and son, but in proviso (i.) to this very sub-section it is provided that para. (*c*) shall apply—I turn it round so as to give its affirmative effect—even though there would be a lapse on the death of the person by whom the disposition is made. Although, therefore, the father, by appointing the income during the joint lives of himself and his son only, is appointing it for a period that may be less than the whole life of his son, for the father might die before the son, that contingency does not render the income income which must be treated as the father's income on the ground that it is not made payable to the son during his whole life. It is to be noted that once more we find meticulous provisions dealing with the possibility of the income being payable during joint lives. Then we come to this effective part of sub-s. 1: "Any income . . . . (*c*) which by virtue or in consequence of any disposition . . . . is payable . . . . for the benefit of" a child of the settlor "for some period less than the life of the child . . . . shall, subject to the provisions of this section, but in cases under the above paragraph (*c*) only if and so long as the child is an infant and unmarried, be deemed for the purposes of the enactments relating to income tax . . . . to be the income of the person who is or was able to obtain the beneficial enjoyment thereof, or of the person, if living, by whom the disposition was made, as the case may be, and not to be for those purposes the income of any other person." I must point out once again that the sub-section is drawn with great precision and must be considered accordingly, and in view of the proviso to which I have referred and of the fact that for the purpose of revocation in this case an outside consent must be obtained, I think it plain that a benefit is not given to the child in this case for a period less than his life.

A further argument is presented under proviso (ii.), which says that "for the purposes of the said paragraph (*c*) income shall not be deemed to be payable to or applicable for the benefit of a child for some period less than its life by reason only that the disposition contains a provision"—shortly put, for a protecting clause, protecting against bankruptcy, assignment or charge. In other words, the proviso says that the child is to be treated as taking during the whole of his life, although the income is no longer made payable to him as of right after bankruptcy.

Is it then possible to set all these meticulous provisions aside and to neglect the words in para. (*c*), "by virtue or in consequence of any disposition," and say that because if and when, with the consent of some outside person, the deed is wholly torn up there will be a defeasance of the income, we ought to treat the deed as one which does not provide for the payment of income for the period of the child's life. I feel that that is not possible. I think we have to take the deed and test it by the sequence of touchstones which are laid down in the section.

I have looked with some care at the unreported case (1) decided by the Court of Session to which we have been referred, and I find that the Lord President says that, inasmuch as the payments there were only to be made until the youngest of a class of children attained the age of twenty-one, that prevented it being possible to say that the children had a right to income for the period of their respective lives. He said that by virtue of the terms of the deed in question it was quite obvious that the income was made payable for periods less than their lives. I observe that Lord Sands, while not disagreeing from those observations of the Lord President, said: "I do not disagree with the result at which your Lordship has arrived, but I think that the consideration that there was this contingency which deprived the income, in any view, of being one for the period of life, is fatal," and he therefore bases his judgment on the very terms of the deed itself. Lord Blackburn said the same, and Lord Morison said: "The other important words in the sub-section are 'for some period less than the life of the child,' and, accordingly, in considering whether a particular income escapes taxation or not under this section, you have to look at the terms of the disposition, ascertain whether the child has an absolute right, and ascertain whether that right is for a less period than its own lifetime." It follows that the members of the Court of Session, in dealing with this matter, had regard for the purpose of their decision to the right of the child by virtue and in consequence of the disposition. We have to do the same, and, by virtue of the disposition, examined in the light of these paragraphs and provisos of the Act, it cannot be said that provision is made for the benefit of the child for a period less than his life.

The consequence is that we agree with Rowlatt J. and the appeal is dismissed with costs.

(1) *Levitt* v. *Inland Revenue Commissioners.* Since reported 1932 S. C. 629.

SLESSER L.J. I agree. This disposition is expressed to be for the joint lives of the settlor and his son. By proviso (i.) to sub-s. 1 of s. 20, it is enacted that para. (*c*), which we are here considering, "shall not apply as regards any income . . . . which is payable to or applicable for the benefit of a child during the whole period of the life of the person by whom the disposition was made." So that we may approach this case by disregarding the contingency that the rights of the son may not last for his whole life by reason of the death of the father before him. Excluding that matter, there is no doubt, in my mind, that the disposition of the income in this case does exist for a period not less than for the life of the child; nor is it suggested by the Attorney-General or Mr. Stamp that, apart from a certain matter, to which I will refer, the disposition is not for the period of the life of the child. The provision of the settlement upon which they rely reads: "Provided always that the settlor may at any time or times hereafter by deed or deeds revocable or irrevocable with the consent" of any one of certain named persons "revoke in whole or in part the trusts." They argue that, in so far as the whole of this disposition is subject to revocation at any time by the settlor with the assent of one of the named persons, it cannot properly be said to be a disposition under which income is payable for the life of the child. I am unable to accept that view on the construction of the section. In my opinion the income is payable by virtue of the disposition for the life of the child. The disposition itself makes the income payable for the life of the child and not for a period less than the life of the child, and the fact that it remains within the power of the settlor to bring the whole disposition to an end by revocation does not seem to me to justify the assumption that the disposition itself is for a period less than the life of the child. It is not. The disposition is for the life of the child. The settlor has reserved to himself the power to end the disposition, but that is an entirely different matter. The language of the sub-section might have provided for such a case, but it does not do so. In those circumstances we have to give effect to the language as it exists and, in my opinion, the Crown fail to bring this case within para. (*c*) for the reasons which I have stated, and the appeal must fail.

ROMER L.J. I agree, and have very little to add. It is said that, unless we give effect to the contention of the Crown, we shall be defeating the obvious intention of the Legislature, as expressed in s. 20 of the Finance Act, 1922; but when I look at that section I find in the forefront in para. (*a*) of sub-s. 1 an indication of intention which seems to me strongly to support the decision of Rowlatt J. Looking at that paragraph I find that the Legislature has provided that, where a person, under or by virtue of a disposition made by himself, has the capacity, whether by exercising a power of appointment or a power of revocation or otherwise, of making certain income his own, that income shall, for the purposes of taxation, be treated as his own, and not that of the person from whom he has the power of taking it away by the exercise of the power. But the Legislature has expressed its intention in so many words, that that provision shall only apply where the power can be exercised without obtaining the consent of some third party; I find, therefore, in that sub-section an indication of the intention of the Legislature that, where income can only be made the income of the owner of a power by the exercise of the power with the consent of some third person, the income is not to be considered as sufficiently within his power to justify its being treated, for the purpose of taxation, as his own.

I start then with that indication of intention; and it seems to me that para. (*a*) has dealt completely and fully with all cases where the disponor has power to retake possession of the income by means of a power of revocation or a power of appointment that he can exercise in his own favour. When we come to the subsequent paras. (*b*) and (*c*)—especially (*c*)—I find, as I think, the Legislature dealing with particular dispositions that have been made by some instrument. Looking at the settlement in the present case, I think it perfectly plain that, by virtue and in consequence of that instrument and looking at nothing else, income is made payable to the child during his lifetime, and not for a period less than his lifetime. It is true that the settlement can be destroyed by the settlor by an exercise of the power of revocation with the consent of one of the five persons named just as it would have been destroyed if the settlor had become bankrupt within two years from the date of the settlement, and would be destroyed, in certain events, if he became bankrupt within ten years from the date of the settlement; but that does not enable the Court to say that, by virtue or in consequence of the instrument, while it is unrevoked and unimpeached, the income is not payable to the child during his lifetime. It was said by Mr. Stamp that we ought to read this settlement as though the direction were to pay the income to the child during his life, or until the power of revocation is exercised. If the trust had been expressed in those terms, I think I should agree that the child was not entitled by virtue or in consequence of the instrument to the income during his life. But there is a wide difference between a direction to pay income to somebody for life or until he becomes bankrupt and a direction to pay income to some person for life, which direction fails to take effect by reason of a subsequent bankruptcy. Here, if the trust had been to pay the income to this child until the settlor became bankrupt within two years or ten years, or any other period short of life, I should agree that the income was not payable to the child by virtue or in consequence of this instrument during his life; but the fact that, in the event of the settlor's bankruptcy within two years the income would no longer be payable to the child, does not enable it to be said that under or in consequence of this instrument the income is payable to him for less than the period of his life.

I only want to add this. I agree with every word of the judgment of Rowlatt J. with one exception. The two provisos to sub-s. 1 might, he thought, be regarded as merely put in ex abundanti cautela. I do not take that view at all. They were absolutely necessary because, if it had not been for those provisions, a trust to pay the income to a child until he became bankrupt or until he assigned or made a charge upon the income, would not, as I look at the matter, be a trust to pay the income to the child during his life.

For these reasons I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitor for the Inspector of Taxes: *Solicitor of Inland Revenue.*

Solicitors for the trustees: *Shirley Woolmer & Co.*

H. C. G.

HILL AND ANOTHER *v.* ALDERSHOT CORPORATION.

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1932
July 22, 25;
Oct. 24.

Local Government—Sewers and Drains—"Single private drain"—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 4, 23, 25, 41—*Public Health Acts Amendment Act,* 1890 (53 *&* 54 *Vict. c.* 59), *s.* 19.

Three houses owned by the appellants formed part of a row of fifteen houses, the remaining twelve belonging to different owners. Each house of the fifteen was drained by a separate pipe into a common pipe which ran the whole length of the row and took the drainage of all the fifteen houses into a sewer in the street. The respondent local authority contended that the common pipe was a "single private drain" within s. 19 of the Public Health Acts Amendment Act, 1890:—

Held, applying the decision of the majority of the House of Lords in *Wood Green Urban District Council* v. *Joseph* [1908] A. C. 419, that in the absence of evidence that the pipe in question had been constructed on the requisition of the local authority under s. 23 or s. 25 of the Public Health Act, 1875, the respondents had failed to establish that the pipe was a "single private drain" within s. 19 of the Act of 1890.

Decision of Divisional Court reversed.

APPEAL from the decision of a Divisional Court on a case stated by justices for the county of Southampton.

On July 30, 1931, the justices determined a complaint preferred on behalf of the Aldershot Corporation as the local authority for the borough (hereinafter called "the respondents") against W. P. Hills, of Coombe Cottage, Windmill Lane, Epsom, and J. W. Reed, of 4 Arthur Street, Aldershot, the executors of the late W. T. Hill (hereinafter

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called " the appellants "), for the recovery from the appellants, as the owners of three houses, 13, 15 and 17 Edward Street, in the said borough, of the sum of 73*l.* 18*s.* 1*d.* which the respondents claimed as due to them from the appellants under s. 41 of the Public Health Act, 1875, and s. 19 of the Public Health Acts Amendment Act, 1890, in respect of drainage works executed by the respondents.

At the hearing the following facts were proved or admitted :—

Sect. 19 of the Public Health Acts Amendment Act, 1890, was at all material times in force in the respondents' district.

Edward Street runs east and west, and on the north side thereof is a row of fifteen houses numbered consecutively 13 to 41 (odd numbers).

At all material times the appellants were the owners of three of those houses—namely, Nos. 13, 15 and 17, the remaining twelve houses belonging to other owners. The required application to the respondents was made under s. 41 of the Public Health Act, 1875, and all necessary notices were served upon the appellants.

At the date of the service of the said notices each of the said fifteen houses was drained by one pipe into the pipe shown in red on the accompanying plan. (1)

The appellants did not dispute their liability to pay for all pipes which were constructed by the respondents and replaced the single pipes which drained their houses into the said pipe shown in red, these single pipes being indicated on the plan by the letters AH, BH, HI, CI, DE, and FG. They disputed their liability to pay for any work executed by the respondents to the pipes so indicated by the letters IJK, EGJ, KL and LM.

The respondents claimed that, although the pipes so indicated by the letters IJK and EGJ took the drainage of

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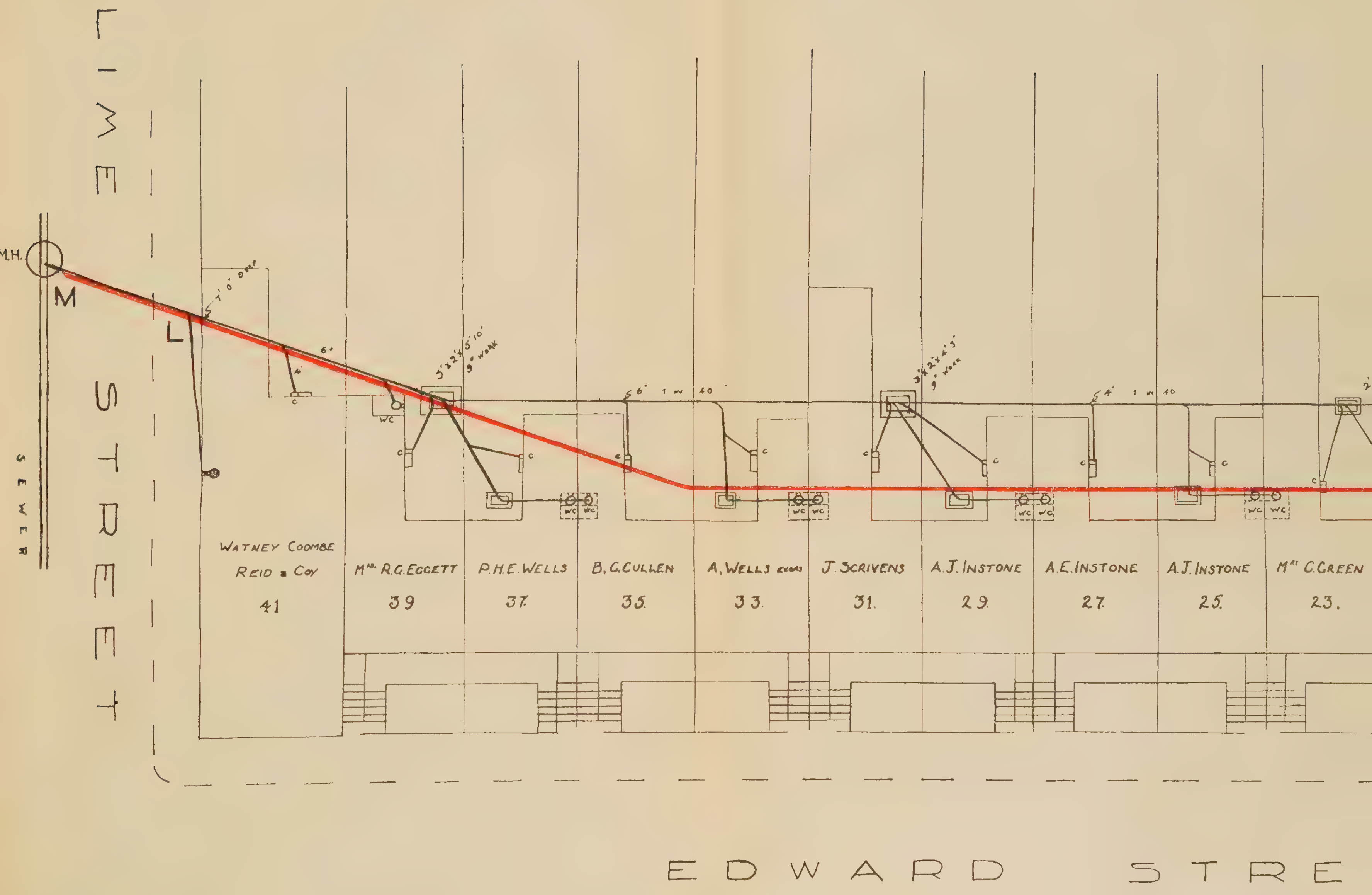
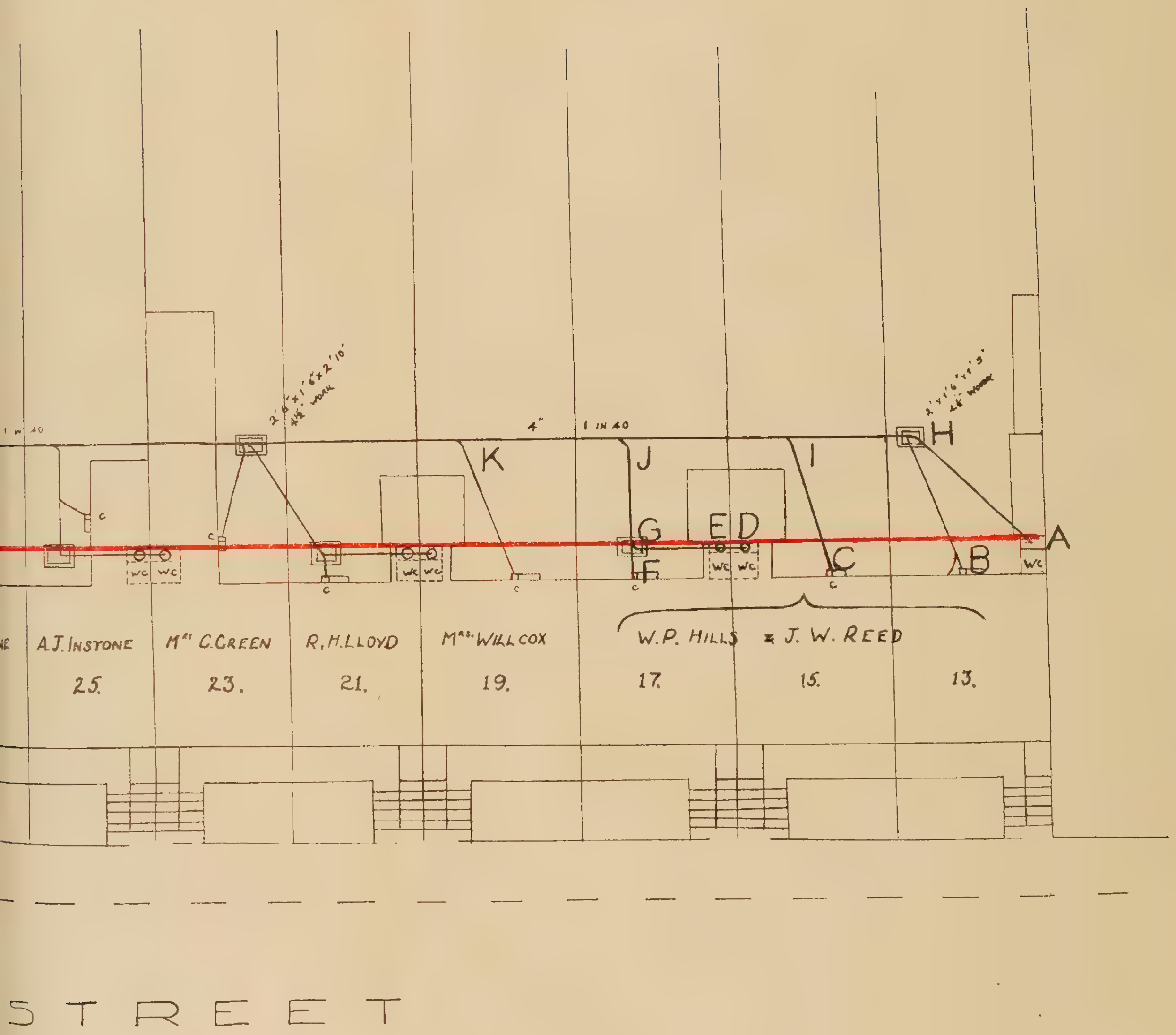
(1) The red line pipe was later done away with by the respondents, who substituted therefor the black line pipe H to M. It was for the cost of this black line pipe and the connections thereto that the respondents claimed payment, but the liability for the pipe H to M depended upon whether the red line pipe was or was not a " single private drain " within s. 19 of the Act of 1890.


LIME STREET
SEWER
M.H.
M
L
7' 0" DEEP
6"
4"
3'x2'x5'10"
9" WORK
6" 1 IN 40
3'x2'x4'3"
9" WORK
4" 1 IN 40
C
WC
WATNEY COOMBE REID & COY
41
MRS. R.G. EGGETT
39
P.H.E. WELLS
37.
B.G. CULLEN
35.
A. WELLS EXORS
33.
J. SCRIVENS
31.
A.J. INSTONE
29.
A.E. INSTONE
27.
A.J. INSTONE
25.
MRS. C. GREEN
23.
EDWARD STRE


1 IN 40
2'6"x1'6"x2'10"
4½" WORK
4"
1 IN 40
2'x1'6"x1'3"
4½" WORK
H
K
J
I
c
c
G
E
D
A
WC
WC
WC
WC
WC
WC
WC
c
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F
C
B
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A.J. INSTONE
MRS C.GREEN
R.H.LLOYD
MRS WILLCOX
W.P. HILLS & J.W. REED
25.
23.
21.
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17.
15.
13.
STREET

two or more houses not belonging to different owners, and the pipe so indicated by the letters LM was under the public highway, these facts did not prevent the whole of the pipe so indicated by the letters AM being a single private drain.

The justices held that the pipe shown in red was a single private drain from A to M, and ordered the expenses less the lengths so indicated by the letters IJK, EGJ and LM to be equally divided per house.

The question for the Court was whether the justices' decision was correct in law.

The Divisional Court (Lord Hewart C.J., Avory and Macnaghten JJ.—the judgment being given by Avory J.) took the view that the effect of s. 19 of the Public Health Acts Amendment Act, 1890, was to make the whole of the conduit from No. 13 to No. 41 a single private drain. The justices' decision was therefore correct and was supported by the reasoning of Lord Russell of Killowen C.J. and Wills J. in *Bradford* v. *Eastbourne Corporation* (1), which was not overruled or dissented from by the House of Lords in *Wood Green Urban District Council* v. *Joseph* (2), but was expressly approved and adopted by the Court of Appeal in *Thompson* v. *Eccles Corporation*. (3) It was, however, admitted on behalf of the respondents that the justices were in error in holding that the portion L to M was part of the single private drain, and the appellants were not charged in respect of that portion.

The appellants appealed. The appeal was heard on July 22 and 25, 1932.

Randolph A. Glen for the appellants. The question is whether the pipe represented on the plan by the red line A to L is, as the respondents contend, a single private drain within s. 19 of the Public Health Acts Amendment Act, 1890 (4),

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(1) [1896] 2 Q. B. 205.

(2) [1908] A. C. 419.

(3) [1905] 1 K. B. 110.

(4) Public Health Acts Amendment Act, 1890, s. 19: "(1.) Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under section forty-one of the Public Health Act, 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section

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or, as the appellants contend, a sewer and therefore repairable by the respondents as the local authority. The decision of the House of Lords in *Wood Green Urban District Council* v. *Joseph* (1) clearly establishes this, that if a local authority wants to say that a pipe which would otherwise be a sewer within s. 4 of the Public Health Act, 1875, is a single private drain within s. 19 of the Public Health Acts Amendment Act, 1890, they must show from the history of the pipe that the local authority required it to be made under s. 23 or s. 25 of the Act of 1875: see the observations of Lord Ashbourne (2) and those of Lord Atkinson. (3) No evidence of this nature was given in this case, and in the absence of such evidence the respondents cannot be heard to say that the pipe is a single private drain. The common pipe in the present case was no more likely to have been constructed because required to be made under these two sections than was the common pipe in the *Wood Green* case. (1) In *Kingston-upon-Hull Corporation* v. *North Eastern Ry. Co.* (4) evidence was given that the pipe there in question was made in consequence of a requisition by the local authority.

[He also referred to *Travis* v. *Uttley* (5); *Sykes* v. *Sowerby Urban District Council* (6); and *Holywood Urban District Council* v. *Grainger*. (7)]

W. H. Moresby for the respondents. The Divisional Court was right in holding that the pipe in question was a single private drain within s. 19 of the Act of 1890. The definition of a single private drain given by Lord Russell of Killowen C.J. in *Bradford* v. *Eastbourne Corporation* (8) has not been affected by the decision of the House of Lords in the *Wood Green* case (1); Lord Russell said (9) it was "a drain originally

from the owners of the houses in such shares and proportions as shall be settled by their surveyor or (in case of dispute) by a court of summary jurisdiction."

. . . .

"(3.) For the purposes of this section the expression 'drain' includes a drain used for the drainage of more than one building."

(1) [1908] A. C. 419.
(2) Ibid. 423.
(3) Ibid. 424.
(4) [1916] 1 Ch. 31.
(5) [1894] 1 Q. B. 233.
(6) [1900] 1 Q. B. 584.
(7) [1913] 2 I. R. 126.
(8) [1896] 2 Q. B. 205.
(9) Ibid. 211.

constructed for the drainage of one or more houses, as distinguished from a drain or sewer which any member of the public may have a right to use by connecting with it the drain from his own house"—a definition which exactly fits the facts of the present case. In the *Wood Green* case (1) the houses were drained in pairs, and it was clear that there was discharged into the pipe in question matter which came from an undoubted sewer. Here the position is quite different: each house had its own single drain leading into the common drain; there was no Y-shaped pipe.

Glen in reply. The exact shape of the pipes is immaterial. What is material is whether the alleged single private drain has running into it a pipe which takes the drainage of more than one house belonging to one owner. If it has that pipe it is in the same category as the legs of the Ys in the *Wood Green* case (1), and there is such a pipe in this case though not Y shaped.

Cur. adv. vult.

Oct. 24. The following judgments were read:—

Scrutton L.J. This very difficult and unsatisfactory case depends on the effect of numerous and contradictory decisions on the real meaning of the Public Health Act, 1875, and s. 19 of the Public Health Acts Amendment Act, 1890, on the question when a pipe conveying sewage is a drain repairable by its owner, and when it is a sewer repairable by the local authority. If I had a free hand to construe the statutes without reference to the decisions I should probably have arrived at a different conclusion from that which I have with some difficulty reached. Such a decision would no doubt be welcomed by various non-judicial writers who have protested against too careful adherence to the principle known as stare decisis, following decisions of co-ordinate and superior courts, though you do not agree with them. But, in my view, liberty to decide each case as you think right without any regard to principles laid down in previous similar cases would only result in a completely uncertain law in which no

(1) [1908] A. C. 419.

citizen would know his rights or liabilities until he knew before what judge his case would come and could guess what view that judge would take on a consideration of the matter without any regard to previous decisions.

In the actual decision before us a particular length of pipe has been held repairable by its owners, as a single private drain, under the Act of 1890. The owners appeal. It is not very easy to obtain from the special case or the plan how the original claim of 73*l*. 18*s*. 1*d*. was arrived at or the exact facts and contentions. As I understand, at the time the notice to repair was served the row of houses owned by more than one owner was drained by one pipe shown in red and marked "AM," into which each house drained by one pipe. The complications resulting where pairs of houses in the same ownership are drained into one pipe by a Y pipe, where the leg of the Y carries the drainage of two houses, do not arise. The plan, however, does not show the single pipes which at the time of the notice drained each house into the red pipe. The plan does show a substituted black pipe further off the houses than the red pipe with apparently new black connections from the houses to the main black pipe. It would seem that the material question to settle liability was the status of the red pipe and single pipes communicating with it and not the construction of the substituted black pipe. The original claim made was 73*l*. 18*s*. 1*d*., made up on the apportionment plan of (1.) 43*l*. 2*s*. 10*d*., a purported apportionment of the cost of the main black drain—why this apportionment differs so widely on different houses I do not understand; (2.) 30*l*. 15*s*. 3*d*., the whole cost of the pipes communicating from houses 13, 15 and 17 to the main black pipe. The owners of 13, 15 and 17 admitted some liability for pipes "AHI," "BHI," and "CI," being pipes from houses 13 and 15 up to the first place "I" where two houses of the same owner drained into the same drain. They also admitted liability for "DE," being apparently a new drain from the water-closet of house 15 to the water-closet of house 17, not apparently in the same line as the red pipe, and "FG," a black pipe from house 17 to the old red drain. Whether

"FG" reproduced an old pipe does not appear. They denied liability for "IJK," being the main black pipe carrying the drainage of three houses in the same ownership up to the point where at "K" the drainage of No. 19, a house in different ownership, came in. It is not expressly stated that they disputed liability for the rest of the black pipe "KM," but they apparently did so, treating the pipe as severable according to the property of the land in which it ran. Part of "JK" is not on their land, but they do not seem to have made a separate point of this. The local authority contended that the whole red pipe "AM" was a "single private drain," that it carried the sewage of houses of different owners, and that the fact that up to one point it only carried the sewage of one owner, though of three of his houses, and was then joined by pipes carrying the sewage of other houses and other owners, did not make it any the less a single private drain throughout, carrying in the course of its career sewage of different owners to a public sewer at "M" and, therefore, a drain within s. 19, sub-s. 3, of the Act of 1890.

The magistrates accepted the local authority's contention and held that the red pipe "AM" was a "single private drain," and ordered the expenses to be equally divided per house, less (1.) the lengths "IJK," being the length of the black drain from the point "I" where it took two houses, 13 and 15, to the point "K," where it first received sewage from a house—No. 19—in another ownership; and less (2.) "EGJ," being the new black pipe draining two houses, 15 and 17, to the main black pipe, and "LM," being the pipe between the street edge and the public sewer. I suppose this separation or deduction is based on the view that though "AM" is a single private drain, as they find, it does not in part of its length carry sewage of more than one ownership. This complicated position appears to raise the following questions. Sect. 19, sub-s. 3, of the Act of 1890 prevents the fact that from "K" to "L" the pipe carries sewage of more than one building operating so as to cause "KL" to be a sewer and not a private drain. But does the fact that from "E" to "K" the pipe carries sewage of more than one house, houses not in different ownership, (*a*) make it a sewer, not a drain, (*b*) prevent it even becoming a drain? The red pipe was obviously a single pipe on private land laid down at one time to drain a row of houses, with no right in other houses to drain into it. Do the statutes or authorities require the line of piping to be severed into parts with different status in this artificial way, or must the whole pipe be repaired by the owners with apportionment of the costs? The Act of 1875, by s. 13, vests all existing and future sewers in the local authority, with certain exceptions, which do not apply to this case. Sect. 15 requires the local authority to keep in repair all sewers belonging to them, and s. 19 requires them to cause the sewers belonging to them to be constructed, covered, ventilated and kept so as not to be a nuisance or injurious to health. Sect. 41 allows the local authority on complaint as to the condition of any "drain" to investigate the matter, and if the "drain" is in bad condition to require the owner to do the necessary works, and, if he does not do such works, themselves to do these works and charge the owners with the cost. So far the owners must keep "drains" in order; the local authority the "sewers." For the definitions one turns to s. 4: "'Drain' means any drain of and used for the drainage of one building only . . . . and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed"; "'sewer' includes sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies. . . . ." It is now seen (though apparently it was not seen for some time) that so far as this Act is concerned, once you get the drainage of two buildings, whether occupied by the same or by different persons, into a drain, it becomes a sewer repairable by the local authority, though it is on private land, and though no one else can drain into it without the authority of the owner of the land. This raised great difficulties where one pipe or conduit carried the drainage of a row of buildings into a public sewer in the road. Some local authorities dealt with the difficulty by private Acts, as in *Kingston-upon-Hull Corporation* v. *North Eastern Ry. Co.* (1), omitting the requirement of houses in different ownerships. Another attempt was made to deal with the matter by s. 19 of the Act of 1890, which begins: "Where two or more houses belonging to different owners are connected with a public sewer by a single private drain. . . . ." Now such a pipe would, under the Act of 1875, be a sewer and not a drain. Sect. 19, sub-s. 3, therefore, provided that "for the purposes of this section the expression 'drain' includes a drain used for the drainage of more than one building," which is to be a "drain," though under the Act of 1875 it would be a "sewer." I think all the discordant authorities agree that so far as the subject-matter of the section is concerned its provisions are independent of the definitions of the Act of 1875, and certain "sewers" under the Act of 1875 are yet repairable by or at the expense of the private owner, if they are "single private drains" as defined by the Act of 1890.

The statutes being difficult to work, the decisions on particular facts are exceedingly chaotic and contradictory. The first landmark appears to be *Bradford* v. *Eastbourne Corporation* (2), where a Divisional Court composed of Lord Russell C.J. and Wills J. had to deal with a direct contradiction between the decisions of two other Divisional Courts. In that case a single drainpipe in private property conveyed the drainage of six houses of different ownerships to a public sewer. It is obvious that at the further end of the drain only one house would be concerned. It was argued that as the pipe carried the drainage of more than one house and was laid before the Act of 1890 it must be a sewer. Lord Russell, after critically discussing the language of the Acts, came to the conclusion (3) that "single private drain" meant "a drain originally constructed for the drainage of one or more houses, as distinguished from a drain or sewer which any member of the public may have a right to use by connecting with it the drain from his own house." He concluded (1) by referring to "the highly unsatisfactory state of the existing legislation. . . . . It is entirely unsystematic and most confused," and urging that "in the public interest steps ought to be speedily taken to reduce the existing chaos into system and order." I refer to, without reading, the similar passage in the judgment of Wills J., where he points out the difficulty of seeing why owners of a row of houses who would be liable to repair if each ran a drain to the public sewer should escape liability if they combined on private land to run their sewage through one pipe to the public sewer.

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(1) [1916] 1 Ch. 31.

(2) [1896] 2 Q. B. 205.

(3) Ibid. 211.

The *Eastbourne* case (2) received the approval of the Court of Appeal in *Thompson* v. *Eccles Corporation* and *Haedicke* v. *Friern Barnet Urban District Council.* (3) A pipe running under six houses of A. proceeded under seven houses of B. to the public sewer. It is obvious that under A.'s houses it would, under the Act of 1875, be a sewer. It was held by the justices that the pipe under B.'s houses was a single private drain, and he was ordered to repair it. The Court of Appeal accepted the *Eastbourne* case (2) as giving "the most intelligible and reasonable interpretation of the section." It would appear to follow that if the pipe under A.'s houses was a sewer, it did not stop the rest of the pipe being a private drain, but probably the whole pipe was treated as a private drain.

I have looked at but pass over a number of intermediate decisions of the most contradictory character, but turning on particular facts, and come at once to one of the chief sources of difficulty, the *Wood Green* case (4), as far as I know, the only decision of the House of Lords on the subject. A row of houses built in pairs communicated with a common pipe which led to a public sewer. The communication of each pair of houses with the common pipe was by pipes forming a Y, with the result that the leg of the Y conveyed the sewage of two houses. If only the Act of 1875 applied the

(1) [1896] 2 Q. B. 213.
(2) [1896] 2 Q. B. 205.
(3) [1905] 1 K. B. 110.
(4) [1908] A. C. 419.

leg would apparently be a sewer, the arms drains. If by sale the houses came into different ownership, apparently under the Act of 1890 the leg would be a single private drain. As there appears to be no ground of merits or reason for this distinction, one would desire to avoid if possible such an unreasonable result. We have been furnished with the reports of the inferior Courts, which show various grounds of decision. The special case finds that it was admitted that the leg of the Y was a sewer, and the magistrates found that this fact prevented the houses being connected with a public sewer by a single private drain. The judgment of the Divisional Court was given by Lord Alverstone C.J. (1), with whom Lawrance and Ridley JJ. concurred, without adding anything except that Lawrance J. said he found it impossible to reconcile the cases. The facts were that the local authority claimed for work done to the common pipe at a point where it received drainage from houses of other owners above and below, and drainage from houses of the same owner through the legs of the Ys. The owner had been required to repair the arms of the Ys and had done so; the local authority had repaired the legs of the Ys without claiming on the owner, and the expenses in dispute were those of repairing the pipe common to the houses both of the respondent and the owners above and below him. Lord Alverstone thought he had found distinctions between the *Eastbourne* (2) and *Eccles* (3) cases and the case before him which I have not been fortunate enough to understand. I think the real truth is he did not like the decisions; he thought they led to unreasonable results, and he declined to follow the Court of Appeal, though Lord Collins had expressly said he thought Lord Russell's decision was right. I understand the ground of his and that Court's decision to be that as the legs of the Ys were admitted to be and were sewers, the pipe into which they flowed, AB, could not be anything but a sewer. Therefore the house could not be said to be connected with a public sewer by a private

(1) [1907] 1 K. B. 182, 187.

(2) [1896] 2 Q. B. 205.

(3) [1904] 2 K. B. 1; [1905] 1 K. B. 110.

drain. I do not think he faces the question whether a drain, as defined by s. 4, sub-s. 3, of the Act of 1890, can be severed so as to assume different characters in different parts of its continuous course. The Court of Appeal dealt with the matter very shortly. They said, assuming the continuous line to be a single private drain, yet, as the drainage of a house gets to it through a sewer, the house cannot be said to be connected with the public sewer by a private drain; a sewer breaks the connection. In the House of Lords there were only two judgments, Lord Atkinson's, with whom Lord Loreburn, Lord James of Hereford and Lord Macnaghten agreed, and Lord Ashbourne's. Lord Ashbourne took the view of the Court of Appeal that the intervention of a sewer, the leg of the Y, prevented the house being connected with the sewer by a single private drain. I understand the passage in Lord Atkinson's judgment (1) to disagree with this view and to hold it erroneous. He appears to me to hold that if sewage from a house cannot reach a public sewer without passing through a private drain, the house is connected with the public sewer by a private drain. On the second point, whether the continuous line of pipe is a single private drain, I have great difficulty in following the decision. If Mr. Glen, one of the counsel in the case, is correct in stating, as he does in his work on Public Health, 14th ed., vol. i., p. 853, that it "was based on a ground which had not been mentioned by any of the Courts below, or in the arguments of either of the parties at any stage of the case," my difficulty is intelligible. I understand Lord Atkinson's view to be that unless it is proved that the pipe in question was required by the owners under ss. 23 and 25 of the Act of 1875, it cannot be a "single private drain" repairable by the owners. I should have thought, with respect, the opposite was more likely; it would be more probable that the owners should have to repair a drain they had constructed on their own land on their own initiative than one they had constructed because the local authority required them to do so and prescribed the method

(1) [1908] A. C. 430.

of construction. I doubt whether, although Lord Atkinson said that the only class touched by s. 19 were conduits which ss. 23 and 25 required the owner to provide, that is the real ground of his decision. Pages 428 and 429 of his judgment are difficult to follow. I read them to be (1.) p. 428: without the definitions of 1875 there should be no difference between houses draining into a public sewer by separate private pipes and houses doing so by one private conduit; (2.) p. 429: but the definitions of 1875 do not allow this, because the junctions to the conduit make a sewer—this, he says, is a "grotesque result"; (3.) the Act of 1890 only corrected part of the absurdity, being limited to houses belonging to separate owners and leaving untouched houses belonging to the same owner using one pipe.

If this is the result of the decision of the House of Lords—and with some doubt, and not myself agreeing with the result, I think it is—it remains to consider its effect on the decision of the Divisional Court in the present case. This again is the reasoned judgment of one judge, without any detailed assistance from his brethren. Avory J., as I understand him—though I respectfully wish, with his great experience, he had gone a little more into detail—thinks that the *Wood Green* case (1) turns on the admission that the legs of the Ys were sewers. As I read the judgments of the House of Lords, this would not matter if the two arms of the Y or the straight pipe were used by different owners, but when the ownership is the same s. 19 has not corrected the absurdities resulting from the definitions of the Act of 1875, and you get a pipe, part sewer, part drain, which cannot as a whole be a private drain. Avory J. goes on to express the view that if into any part of the continuous drain you get two different owners discharging, the whole of the pipe, though it receives in other places only drainage from other houses of the same owner, becomes a private drain. I sympathize with this view and, if I had been free, should have been glad to adopt it, but, after careful consideration, I do not think it is consistent with the decision of the House

(1) [1908] A. C. 419.

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of Lords. I think the *Wood Green* case (1) takes the view that s. 19 does not prevent pipes carrying only sewage from different houses in the same ownership from being sewers, and that a line composed partly of a sewer under the Act of 1875 and partly a private drain under the Act of 1890 cannot as a whole be a private drain. The result seems to be that a pipe on private land draining six houses in different ownership is a single private drain repairable by the owners, but that if the owner of No. 6, the house furthest from the public sewer, should also own No. 5, the whole pipe will be a sewer repairable by the public authority. This, with all respect to the Legislature, or those who have so decided, seems to me to be an absurd result. The absurdity may either be in the statutes, or, if they are ambiguous, in the decisions on their meaning.

I regret, therefore, that in my opinion the appeal must be allowed, and the question in the special case answered by saying that the red line from A to L is not a single private drain; with the consequence that the claim fails, except in so far as it has been admitted.

I regret the result, because I think the consequences of the decision, though in accordance with the Act of Parliament as interpreted by the House of Lords, are ridiculous. I am afraid it is hopeless to ask Parliament to deal with the matter by making some intelligible and reasonable provisions on the subject. The present legislation, with the conflicting attempts to interpret it, is a disgrace to English legislation.

The appellants must have the costs here and below.

LAWRENCE L.J. This case raises once more the vexed question whether a conduit pipe is or is not a single private drain within the meaning of s. 19 of the Public Health Acts Amendment Act, 1890.

The conduit pipe in question has recently been done away with and new drainage works have taken its place, but its former site is shown in red on the plan attached to the special case. The incidence of the liability for the cost of these new drainage works depends upon whether the conduit pipe was or was not a single private drain. It was situate at the back of a row of fifteen houses on the north side of Edward Street in the borough of Aldershot, numbered consecutively 13 to 41 (odd numbers); it commenced at No. 13 and ran in a westerly direction under and through the outbuildings and backyards of the fifteen houses to Lime Street, where it discharged into a public sewer. The whole length of the conduit pipe from its starting point marked "A" on the plan until it reached Lime Street at the point marked "L" on the plan was in private ground. Such of the fifteen houses as did not directly drain into the conduit pipe were connected with it by short lengths of single pipes which, however, are not shown on the plan. The case states that "at all material times" the appellants were the owners of Nos. 13, 15 and 17, and that the remaining twelve houses (Nos. 19 to 41 inclusive) belonged to other owners. The case does not state what were the material times referred to or give any indication as to when or by whom the houses were built or as to when or under what circumstances the conduit pipe was constructed. The justices have held that the conduit pipe from "A" to "L" was a single private drain within the meaning of s. 19 of the 1890 Act, and the Divisional Court has affirmed that decision.

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(1) [1908] A. C. 419.

In *Thompson* v. *Eccles Corporation* (1) the Divisional Court held, in my opinion rightly, that the expression "belonging to different owners" in s. 19 of the 1890 Act means "not all belonging to the same owner" and does not imply that each of the houses must belong to a person who does not own any of the others. Prima facie, therefore, the present case would seem to be one where two or more houses belonging to different owners were connected with a public sewer by a single private drain within s. 19 of the 1890 Act. The matter, however, is by no means so simple as it seems. Sect. 19 of the 1890 Act cannot be divorced from the relevant provisions of the Public Health Act, 1875, and must be read in conjunction, and made to harmonize, with those provisions, a task which, as the numerous reported cases on this subject show, has given rise to much difficulty and divergence of judicial opinion. Sect. 4 of the 1875 Act defines the words "drain" and "sewer" and vests all "sewers" in the local authority, on whom the duty of keeping them in repair is imposed. Neither the expression "public sewer" nor the expression "single private drain" is defined in either Act, and the precise meaning of these expressions is left in obscurity. It is moreover difficult to assign any intelligible reason for introducing the test of the ownership of the houses (which ownership may vary from time to time) into s. 19 and for confining the section to houses belonging to different owners, leaving houses in the same ownership unaffected by its provisions. It is obvious that the section was drafted in total disregard, or with an imperfect appreciation, of the effect of the provisions of ss. 4, 13 and 15 of the 1875 Act.

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(1) [1904] 2 K. B. 1.

In *Travis* v. *Uttley* (1) Wills J. expressed the opinion that it was impossible to say that part of a pipe used for the drainage of one building was a drain and the rest of the same pipe used for the drainage of more than one house was a sewer, and that in such a case the pipe would be a sewer from end to end. In *Bradford* v. *Eastbourne Corporation* (2), however, the same learned judge acknowledged that in view of the decision of the Court of Appeal in *Kershaw* v. *Taylor* (3) the opinion expressed by him in *Travis* v. *Uttley* (1) must be erroneous, and that the same pipe might be a drain so long as it received the drainage of one house only, but a sewer from the point where the drainage of a second house came into it.

Following out this line of reasoning, it might be said in the present case that the conduit pipe in question was a drain so long as it received the drainage of No. 13 only, that it became a sewer from the point where the drainage of No. 15 came into it, and that it became a single private drain from the point where the drainage of No. 19 came into it, as then, for the first time, it received the drainage of two or more houses belonging to different owners. Any such conclusion, however,

(1) [1894] 1 Q. B. 233.
(2) [1896] 2 Q. B. 205, 218.
(3) [1895] 2 Q. B. 471.

would seem to be in conflict with the decisions of the Court of Appeal in *Thompson* v. *Eccles Corporation* and *Haedicke* v. *Friern Barnet Urban District Council* (1) and of both the Divisional Court and of the Court of Appeal in *Wood Green Urban District Council* v. *Joseph.* (2)

In the *Eastbourne* case (3) the Divisional Court (composed of Lord Russell of Killowen C.J. and Wills J.), in a considered judgment, held that a conduit pipe used for the drainage of six houses belonging to different owners and running through private ground until it reached the road in which the public sewer into which it discharged was situate was a single private drain within s. 19 of the 1890 Act. The report does not state how the houses were connected with the conduit pipe but, presumably, they either drained directly into it or were connected with it by single pipes. No question arose in that case as to the effect of the section in cases where several of the houses draining into the common pipe belonged to the same owner. Lord Russell, in his judgment, pointed out the highly unsatisfactory state of the existing legislation, which he described as unsystematic and most confused. In both the *Eccles* case (1) and the *Friern Barnet* case (1), however, the Court had to deal with a common pipe which received in the first instance the drainage of two or more houses belonging to the same owner, and then the drainage of houses belonging to different owners.

In the *Eccles* case (1) there were two blocks of six houses each belonging to one Edward Johnson. There was a six-inch pipe which passed through and under these houses and received the drainage from each of them. In continuation of this pipe there was a nine-inch pipe running through and under the cellars of seven houses belonging to the appellant Thompson. This pipe received the drainage of those seven houses, as well as that conveyed by the six-inch pipe, and discharged into a main sewer of the respondent corporation. Both the six-inch and nine-inch pipes were laid through private property until the main sewer was reached. The

(1) [1905] 1 K. B. 110.

(2) [1907] 1 K. B. 182.

(3) [1896] 2 Q. B. 205.

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nuisance complained of was that the nine-inch pipe under one of the appellant's houses was in a bad condition and required alteration or amendment.

In the *Friern Barnet* case (1) there were four houses of which the plaintiff was the owner and sixteen houses belonging to other owners. All these houses drained into a common pipe which led into a public sewer. The whole of the common pipe was on private ground. It is not stated in the report how the houses were connected with the common pipe, nor whether the plaintiff's houses were the first to drain into it. The nuisance complained of arose from an obstruction in the common pipe near one of the plaintiff's houses and upon his land.

The *Eccles* and *Friern Barnet* cases (1) were heard together in the Court of Appeal, and that Court decided that they could not be distinguished from each other or from the *Eastbourne* case (2), which case was held to have been rightly decided; with the result that both the common pipes in question were held to be single private drains within the meaning of s. 19 of the 1890 Act.

The only comment I desire to make on that decision is that none of the members of the Court in delivering their judgments referred to or dealt in any way with the distinction between the facts in the *Eastbourne* case (2), where all the houses draining into the common pipe belonged to different owners, and the facts in the *Eccles* and *Friern Barnet* cases (1), where the common pipes for some distance before receiving the drainage of two or more houses belonging to different owners were conveying the drainage of two or more houses belonging to the same owner.

Had the matter remained there, I should have considered that in the present case we would have been bound to follow the decision of this Court in the *Eccles* and *Friern Barnet* cases (1), whatever my own opinion might have been, as it seems to me that the facts in those cases are practically on all fours with the facts in the present case; but unfortunately a further complication has been introduced into this already over-complicated matter by the decision of the House of Lords

(1) [1905] 1 K. B. 110.

(2) [1896] 2 Q. B. 205.

in *Wood Green Urban District Council* v. *Joseph.* (1) In that case, sixteen houses standing in a row were drained in pairs by pipes constructed in the shape of the letter Y, the leg of each Y being connected with a common pipe which was laid in private ground and ultimately discharged into a public sewer. Six of these houses belonged to the respondent Joseph and the remaining ten to other owners. It was admitted by counsel on both sides that the leg of each of the three Y-shaped pipes draining the respondent's six houses was a sewer. As to this admission, Lord Alverstone C.J., in giving judgment in the Divisional Court, said (2): "The arguments on both sides have proceeded upon the hypothesis that these three pieces of pipe are sewers, and I think that they could not have proceeded otherwise, because the provisions of the Public Health Act, 1875, are quite plain." With the opinion thus expressed I entirely agree. The leg of each Y was a pipe into which the drainage of two houses belonging to the same owner was conveyed and therefore was neither a drain as defined in the 1875 Act nor a single private drain within the meaning of s. 19 of the 1890 Act, but was a sewer vested in the local authority under the 1875 Act. The Divisional Court held that the common pipe was not a single private drain. Lord Alverstone, in delivering judgment, said (3): "It is contended that, although the line of pipes in question would have been a sewer if it had taken away only the drainage of these six houses, yet it is a single private drain because it receives the drainage of other houses, although it still receives the drainage of the three sewers. That seems to me to be so absurd that I prefer, unless I am bound by any decision of the Court of Appeal, to hold, in accordance with what seems to me to be common sense, that this line of pipes has not lost its character of a sewer because it receives the drainage of the other ten houses." The Lord Chief Justice then referred to the *Eccles* case (4) and the *Eastbourne* case (5), and came to the conclusion that these cases were distinguishable on the ground mainly that there the houses were not drained in pairs but by single drains. I find it difficult to appreciate this distinction. Neither the fact that drains are constructed in the shape of a Y, nor the fact that more than one common pipe conveying the drainage of several houses in the same ownership discharge into a common pipe conveying the drainage of houses belonging to different owners can, in my opinion, make any difference in principle. The status of drainage conduits under the 1875 Act is not determined by the manner of their disposition or by the quantity of their contents but by the source of the drainage which they convey. Both in the *Wood Green* case (1) and in the *Eccles* and *Friern Barnet* cases (2) a common pipe was used solely for the drainage of more than one house belonging to the same owner up to the point where it discharged into a pipe conveying the drainage of a house or houses belonging to another owner or other owners. The Court of Appeal affirmed the decision of the Divisional Court but on a different ground—namely, that the respondent's houses were not connected with the public sewer by a single private drain, because the drains from them were immediately connected with sewers which then connected with the alleged single private drain. In other words, the Court of Appeal decided that if a pipe answering to the definition of a sewer contained in the 1875 Act intervened between a drain from the house and the alleged private drain the house was not connected with a public sewer by a single private drain within the meaning of s. 19 of the 1890 Act. Applying that reasoning to the present case, it will be seen that the pipe shown in red on the plan from the point where it receives the drainage of No. 15 until it receives the drainage of No. 19 answers strictly to the definition of a sewer contained in the 1875 Act, and that therefore the appellants' houses Nos. 13, 15 and 17 were not connected with the public sewer in Lime Street by a single private drain. Similarly on the same reasoning in the *Eccles* case (2) and in the *Friern Barnet* case (2) the six-inch pipe in the former and the pipe draining the plaintiff's four houses in the latter answer to the definition of a sewer and, therefore, the houses drained by these pipes were not connected with the public sewer by a single private drain within the meaning of the section. The House of Lords affirmed the decision in the *Wood Green* case (1) both of the Divisional Court and the Court of Appeal. Lord Ashbourne was of opinion that the reasons given in both the lower Courts were right, but Lord Atkinson, in whose judgment Lord Loreburn, Lord James of Hereford and Lord Macnaghten concurred, based his decision on grounds which, so far as appears from the report, were not advanced by counsel on either side, and which apparently differ entirely from the grounds which formed the basis of the decisions in the Divisional Court and in the Court of Appeal. I confess to having found it difficult completely to follow the reasoning upon which the judgment of Lord Atkinson was founded. If I apprehend his judgment rightly, he divided drainage conduits, such as those with which the present case is concerned, into two classes: the first class consisting of drainage conduits, where the owner of several houses has laid the drains of those houses in whole or in part on his own ground so as to unite and thus cause the drainage of his several houses to be carried by one conduit from the point of junction to the same sewer, and the second class consisting of drainage conduits where different owners of two or more houses have combined in providing for the drainage of their respective houses on a similar plan. Lord Atkinson then points out that by force of the definitions of "drain" and "sewer" in s. 4 of the 1875 Act in both of the classes of drainage conduits which he has described the common conduit would cease to be a drain and would be raised to the dignity of a sewer and, consequently, would be vested in the local authority, who would become bound to maintain it at the public expense, a result which he describes as grotesque. He then goes on to state that in his opinion the 1890 Act was passed in order to correct that result in the second class of drainage conduits—namely, in cases where different owners have combined to provide for the drainage of

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(1) [1908] A. C. 419.

(2) [1907] 1 K. B. 182, 187.

(3) [1907] 1 K. B. 187, 188.

(4) [1905] 1 K. B. 110.

(5) [1896] 2 Q. B. 205.

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(1) [1907] 1 K. B. 182.

(2) [1905] 1 K. B. 110.

(1) [1908] A. C. 419.

their respective houses by laying their drains so as to unite in one common conduit, but that the Act has left untouched the first class of drainage conduits—namely, those where the owner of several houses has laid the several drains of those houses so as to unite in one conduit and thereby cause the drainage from those houses to be carried in one conduit to the same sewer. Lord Atkinson then states that the object of the 1890 Act was to bring the second class of drainage conduits within the reach of s. 41 of the 1875 Act, and to transfer to the shoulders of owners of the houses served by that class of conduits the burden of maintaining them. But that class in his view only comprised conduits which ss. 23 and 25 require the owners to provide or see were provided. In coming to this conclusion it would seem as if Lord Atkinson had overlooked the fact that s. 19 of the 1890 Act does not apply to houses drained into cesspools. Lord Atkinson then states that as the alleged single private drain did not on the facts stated in the special case appear to be one to which s. 23 or s. 25 applied, or one which, irrespectively of the definition (presumably referring to the definition of the word "drain" in s. 4 of the 1875 Act), would have come within the purview of s. 41, it was not, in his opinion, a single private drain within the meaning of s. 19 of the 1890 Act. This part of Lord Atkinson's judgment must, I think, be read in conjunction with what he had stated in the earlier part of his judgment—namely, that the time when the person by whom and the purpose for which the alleged single private drain was constructed were not stated and that for all that appeared in the special case it might have been made before any of the houses were built; in other words, Lord Atkinson held that as the history of the drain in question was not shown the local authority was not entitled to succeed. Lord Atkinson then concluded his judgment by expressing his opinion that, if the drain in question had in fact been shown to be a single private drain within the meaning of s. 19 of the 1890 Act, it would have connected the respondent's houses with the public sewer within the meaning of the section, and that the contrary conclusion arrived at by the Court ofAppeal was erroneous.

Whatever may be said in criticism of Lord Atkinson's judgment, and as to the curious results it may lead to in certain cases (such as, for instance, the present case, where some of the fifteen houses in question are more than one hundred feet from the public sewer), it is the plain duty of this Court to follow the decision of the House of Lords in so far as it applies to the facts with which we have to deal in the present case. On the facts stated in the special case (assuming that the justices have rightly appreciated the material time to which they ought to have directed their attention) it would appear that the common pipe in the present case would fall within the second class of drainage conduits referred to by Lord Atkinson, although I confess I find it somewhat difficult to imagine that when the terrace of houses was built, and presumably when the common pipe was laid, the ground and the houses upon it belonged to different owners. But, as I read Lord Atkinson's judgment, it is not enough to show that two or more owners combined to provide for the drainage of their houses by a common pipe in order to come under s. 19 of the 1890 Act; it must further be shown that the common pipe was constructed because its construction was required by s. 23 or s. 25 of the 1875 Act. The reason for this I do not appreciate, but it is plain that Lord Atkinson definitely held that, as the alleged single private drain was not shown to be one to which either s. 23 or s. 25 of the 1875 Act applied, it was not in fact a single private drain.

This decision, in my opinion, applies directly to the facts of the present case. The special case does not state the time when or the person by whom or the purpose for which the alleged single private drain was constructed, and the respondents have not shown either that it was laid in obedience to a notice under s. 23 of the 1875 Act or that it was laid when the houses were built or rebuilt so as to bring it under s. 25 of that Act; nor have they shown that there was a sewer within one hundred feet of any of the houses at the time when it was laid.

In these circumstances, I have come to the conclusion that this Court is bound to hold that the decision of the

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Divisional Court is erroneous and that this appeal ought to be allowed. I confess to having arrived at this conclusion with some hesitation, owing to the fact that Lord Atkinson's judgment in the *Wood Green* case (1) contains no reference whatever to the decisions in the *Eastbourne* (2) and *Eccles* cases (3), the facts in which latter case closely resemble the facts in the present case, leaving me in doubt how far Lord Atkinson's opinion was intended to apply to cases such as the present.

GREER L.J. In Glen's Law of Public Health, 14th ed., vol. i., p. 853, the author summarizes as follows the decision of the majority of the House of Lords in the case of *Wood Green Urban District Council* v. *Joseph* (1): "Lord Atkinson, with whom Lords Loreburn C., Macnaghten and James of Hereford simply concurred, laid it down that the party alleging that a line of pipes is a 'single private drain' within the present section [i.e., s. 19 of the Public Health Acts Amendment Act, 1890], must show that it was originally laid because it was 'required' by s. 23 or s. 25 of the Public Health Act, 1875." This Lord Atkinson definitely laid down in his judgment, and in my opinion the statement in Glen's Law of Public Health as to the effect of that decision correctly represents the decision of the majority of the House of Lords in the case referred to. It was not shown in the present case that the drain which the Aldershot Council alleged to be a "single private drain" was originally laid because it was required by s. 23 or s. 25 of the Public Health Act, 1875. It follows that the Aldershot Council did not establish their case, and their complaint ought to have been dismissed by the magistrates.

This view of the case relieves me of the very difficult task of trying to harmonize the various decisions of the Divisional Courts and the Court of Appeal on this debatable question, and, if they are incapable of being harmonized, of pointing out which of them are right and which of them are wrong—

(1) [1908] A. C. 419.
(2) [1896] 2 Q. B. 205.
(3) [1905] 1 K. B. 110.

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a difficult task which my brethren have essayed with great diligence, but, as I read their judgments, with negative results.

This appeal should therefore be allowed with costs here and below.

Appeal allowed.

Solicitors for appellants: *Gustavus Thompson & Sons, for Eve & Clinton, Aldershot.*

Solicitors for respondents: *Smith, Rundell, Dods & Bockett, for D. L. Griffiths, Town Clerk, Aldershot.*

J. S. H.

OSBORNE *v.* RICHARDS.

1932
July 13.

Road Traffic—Public Service Vehicle—Coach hired by Owner to Football Club and used to convey Persons to Ground—Whether "stage carriage" or "contract carriage"—Necessity for Road Service Licence—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 61, *sub-ss.* 1, 2; *s.* 72.

A proprietor of motor coaches in which he carried passengers from a starting place to the ground of a football club, on being notified that it was necessary to obtain a road service licence in respect of the coaches, entered into a contract with the club to let the coaches at a fixed rate to the club, which then drove them over the route and received the passengers' fares, no such licence having been obtained:—

Held, that the coaches were used by the club as "stage carriages" and not as "contract carriages" within the meaning of the Road Traffic Act, 1930, that as they were so used otherwise than under a road service licence they were used in contravention of s. 72 of the Act, and that the proprietor was guilty of an offence in permitting them to be so used.

CASE stated by justices for the city of Truro.

An information was preferred before the justices by William Osborne, a superintendent of police (hereinafter called "the appellant"), on behalf of the Traffic Commissioners for the Western Traffic area, against Alfred Richards, of Truro, motor coach proprietor (hereinafter called "the respondent"), for that he on January 16, 1932, did unlawfully permit a public service vehicle to be used as a stage carriage without a road service licence, contrary to the Road Traffic Act, 1930, s. 72.

At the hearing of the information the majority of the justices found the following facts proved or admitted: On Wednesday, January 13, 1932, at Truro, police-sergeant Rowland advised the respondent to apply to the Western Traffic Commissioners for a road service licence to enable him to convey passengers between Victoria Square, Truro, and the Truro city football club's ground at Treyew Road on the occasion of football matches. The respondent's reply was: "I don't think it is necessary; and in any case there is a way to defeat them. I can get somebody to hire the coaches." The sergeant then said: "Very well, I shall be there to see if the coaches are used and to see if you have a licence."

On Saturday, January 16, the sergeant was in Victoria Square and saw three coaches, the property of the respondent. One was reserved for the Truro city team, being hired from the respondent under a half-yearly contract, and the other two were loading with passengers. The respondent was also there and saw what was taking place. The sergeant asked the respondent if he intended carrying passengers to the football field, and he replied, "Yes." The sergeant then asked the respondent if he had a road service licence, and the latter replied: "The coaches are hired by Truro city football club, and they will collect the fares. I shan't have anything to do with it. The Traffic Commissioners made these laws, but there is always a way of getting round them. I can hire my coaches to any one, and neither the Traffic Commissioners nor any one else can say anything." The sergeant made a note of the full reply at the time and was not cross-examined upon it, but the respondent in cross-examination denied having made the statement sworn to by the sergeant. The sergeant saw each of the two coaches in question leave Victoria Square once with about sixteen persons in each, and driven by employees of the respondent. Any one who came along could have boarded the coaches in the square and ridden therein to the football field, as was admitted by the respondent, and there was no notice on either of them to show that they had been hired by the football club. Evidence was given that on the last mentioned date several persons, including the respondent, had travelled to the football ground as ordinary passengers in these coaches and had paid their fares to a representative of the respondent; that at that date neither the respondent nor any one else held a licence or permit to operate a stage carriage service between Victoria Square and the football club ground, and that no application was made to operate that service until the respondent made one on February 15, 1932.

On the above-mentioned Wednesday, January 13, in the course of a conversation between them, the respondent had informed Mr. H. Thomas, the secretary of the football club, of the difficulty he was in, and had suggested that the only way to get over it was for the club committee to hire the coaches direct. On January 14 the respondent received a letter from Mr. Thomas, on behalf of the club, stating: "In addition to our usual coach for conveying the team to the football field will you please reserve two coaches to convey our supporters to the football field?" By arrangement the club was debited by the respondent with 10*s.* for the hire of each coach. On Monday, January 18, a person who had collected the fares of the passengers on the two coaches handed to Mr. Thomas 1*l.* 3*s.* 3*d.*, representing 93 fares at 3*d.* each. As the result of his conversation with the sergeant the respondent took legal advice, and in suggesting that the club should hire the two coaches he was acting on that advice and had no intention of breaking the law.

The respondent stated that he had made applications to the Traffic Commissioners for road service licences, though not on this particular route, and had received no answer in time.

On behalf of the appellant it was contended that even assuming that the two coaches had been bona fide hired by the club for an agreed sum they were not used as "contract carriages" within the meaning of s. 61, sub-s. 1 (*c*), of the Act, but were used as and must be deemed to have been "stage carriages" within clause (*a*) of that sub-section; that as stage carriages they would require road service licences, and it was proved by the appellant, and not disputed by the respondent, that at the material date no such licences had been issued to or even applied for by the respondent; and that the respondent by permitting the coaches to be used as stage carriages without such licences was guilty of an offence under s. 72 of the Act.

On behalf of the respondent it was contended that the said vehicles were not "stage carriages" within the meaning of the Act; that they were "contract carriages" within the meaning of the Act; that the vehicles were used as contract carriages and not as stage carriages; and that the respondent did not permit the vehicles to be used as stage carriages, and that the user of contract carriages by the hirer thereof did not constitute an infringement of s. 72 of the Act by the owner of the vehicles.

The justices by a majority found that the two coaches were "contract carriages" hired under a bona fide contract by the secretary of the football club for the purpose of conveying persons from Victoria Square to the football ground upon the occasion of a match in which the club team was engaged; and that, whether he did so or not, the respondent had no intention of breaking the law; and, having regard to that and to the conflicting contentions of the solicitors who appeared for the parties, and to the fact that the respondent had made application to the Traffic Commissioners for a road service licence upon a subsequent similar occasion, they were of opinion that the best way to deal with the case in the circumstances was to dismiss it, and to express their strong disapproval of the way in which the respondent had acted, and also of his attitude towards the Traffic Commissioners.

Wilfrid Lewis for the appellant. The justices were wrong in holding that the appellant's vehicles were contract carriages within the meaning of the Road Traffic Act, 1930, for which a road service licence under s. 72 of that Act was not required. Sect. 61, sub-s. 1, provides that public service vehicles are

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to be divided into the three classes there distinguished. The first of these classes is described in cl. (*a*) of the sub-section as "stage carriages," that is to say motor vehicles carrying passengers for hire or reward at specified fares stage by stage and stopping to pick up or set down passengers along the line of route and any other motor vehicles carrying passengers for hire or reward at separate fares and not being express carriages. The second class is described in cl. (*b*) as "express carriages" which differ from those of the previous class in that they carry the passengers between specified points and do not stop to take up or set down other persons. The third class is described in cl. (*c*) as "contract carriages," that is to say motor vehicles carrying passengers for hire or reward under a contract for the use of the vehicle as a whole at or for a fixed or agreed rate or sum. In order to determine within which of these classes a vehicle comes it is necessary to consider also sub-s. 2, which, apart from the proviso, provides that where persons are carried in a motor vehicle for any journey in consideration of separate payments made by them, whether to the owner or to any other person, the vehicle shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares, whether the payments are solely in respect of the journey or not. It is not here said that the respondent's coaches are express carriages within cl. (*b*), and the question is whether they are stage carriages within (*a*) or contract carriages within (*c*). By virtue of the provisions referred to, these coaches belonged to the former and not to the latter of these classes. It is true that they were motor vehicles carrying passengers for hire or reward under a contract between the respondent as their owner and the football club for the use of the vehicles as a whole by the club at an agreed rate or sum, the hire paid by the passengers being paid not to the respondent but to the club; but it does not follow that the vehicles were therefore contract carriages within cl. (*c*). The coaches were motor vehicles in which persons were carried for a journey in consideration of separate payments made by them, and even though these payments were made to a person other than the respondent as their owner, the vehicles by virtue of sub-s. 2 were to be deemed to be vehicles carrying passengers for hire or reward at separate fares, or, in other words, they were to be deemed for the purposes of this case to be stage carriages within sub-s. 1 (*a*). These coaches were not taken out of the part of sub-s. 2 which has been referred to and prevented from being stage coaches within sub-s. 1 (*a*) by reason of their coming within the proviso to sub-s. 2, which enacts that a vehicle used on a special occasion for the conveyance of a private party shall not be deemed to be a vehicle carrying passengers for hire or reward at separate fares by reason only that the members of the party have made separate payments which cover their conveyance by that vehicle on that occasion. These vehicles, employed as they were employed in pursuance of the contract between the respondent and the football club, were not used on a "special occasion" within the meaning of the proviso. Neither were they used for the conveyance of a "private party" within the meaning of the proviso, that expression denoting a party such as a gathering of friends or club members and being inapplicable to a group of passengers paying separate fares and associated together only as being carried in one and the same vehicle. These vehicles were stage carriages within the meaning of s. 61, sub-s. 1 (*a*), of the Act, and the respondent by using them or permitting them to be used as such without a road service licence was guilty of a contravention of s. 72 of the Act.

H. M. Pratt (*J. L. Pratt* with him) for the respondent. The justices rightly dismissed the charge which was brought against the respondent. The offence which formed the subject of the charge was that the respondent, being the proprietor of the vehicles in question, which were public service vehicles, unlawfully used them or permitted them to be used as "stage carriages" within the meaning of s. 61, sub-s. 1 (*a*), of the Act of 1930 without having obtained a road service licence under s. 72 contrary to the latter section. As these provisions constitute a criminal offence they must be strictly construed in favour of a person charged with having committed the offence, and when so construed they do not apply to the present case. In the first place the respondent's vehicles were not "stage carriages" within the meaning of s. 61, sub-s. 1 (*a*). That sub-section provides that public service vehicles shall be "divided" into three classes, namely (*a*) stage carriages, (*b*) express carriages, and (*c*) contract carriages, and these classes are therefore distinct from each other and mutually exclusive. It is not suggested that these vehicles were express carriages within cl. (*b*). According to the contention of the respondent neither were they stage carriages within cl. (*a*). That clause is separable into two parts dealing with different kinds of stage carriages—namely, first, vehicles carrying passengers for hire at separate fares stage by stage and stopping to pick up or set down passengers; and, secondly, any other vehicles carrying passengers for hire at separate fares and not being express carriages. It cannot be the intention of the Act that the second part of that clause should apply without any qualification to all vehicles carrying passengers for hire at separate fares, because if it were so applied the first part of the clause would be rendered wholly unnecessary and superfluous. The second part of the clause must be construed as being restricted by the first part, and as the first part defines stage carriages as motor vehicles carrying passengers stage by stage and stopping to pick up and set down passengers, so, in accordance with the ejusdem generis rule, the second part should be read as applying only to vehicles carrying passengers subject to limitations of a similar kind. The respondent's vehicles were not subject to any such limitations as are contemplated by cl. (*a*) on its true construction, and they are not, therefore, stage carriages within the meaning of that clause. The vehicles in question, being public service vehicles within s. 61, sub-s. 1, which were neither stage carriages within cl. (*a*), nor express carriages within cl. (*b*), it follows that they were contract carriages within cl. (*c*). It is plain that they came within the exact terms of that clause, being motor vehicles carrying passengers for hire or reward under a contract for the use of the vehicle as a whole at an agreed rate. As to s. 61, sub-s. 2, the words at the end of the operative part of that sub-section, "whether the payments are solely in respect of the journey or not," only mean that payments in addition to the fare for the journey shall not rob sub-s. 1 of its effect. Secondly, even if these vehicles were stage carriages, they were not "used" by the respondent, nor did he "permit" them to be used as such contrary to s. 72 of the Act. A contract was concluded between the respondent and the club by which the vehicles were hired by the former to the latter at a specified rent. The respondent thereupon ceased to have control over the vehicles, and he did not know how the club would use them. He had no longer himself any right to use them or to permit them to be used, or to prevent the club from using them as it pleased. The club acquired the right to use them in any way it chose. After the contract the respondent did not in fact exercise any supervision over the vehicles or receive any of the passengers' fares. There is no finding of fact that the respondent let the vehicles to the club in order that they might be unlawfully used as stage carriages without proper licences or that he thereafter unlawfully used them or permitted them to be used as stage carriages or otherwise. In view of these considerations the justices had no alternative but to dismiss the charge against the respondent.

LORD HEWART C.J. I am clearly of opinion that this appeal should be allowed. No useful purpose would, I think, be served by minutely criticizing the words of an Act passed in 1930, and it would be idle to criticize the form of this special case. I am satisfied, however, that the contention on behalf of the appellant, which was urged before the justices and has been repeated here to-day, is right, and that, even if we assume that the two coaches referred to were hired from the respondent at an agreed sum, they were not used as "contract carriages" within the meaning of s. 61, sub-s. 1 (*c*), of the Road Traffic Act, 1930, but were used as and must be deemed to have been "stage carriages" within sub-s. 1 (*a*) of that section. Mr. Pratt has done all that could have been done to support the case of the respondent, but the matter seems to me to be too clear for argument. In my opinion the appeal should be allowed.

TALBOT J. I am of the same opinion. The question is whether the respondent permitted a public service vehicle to be used as a stage carriage within the meaning of the Road Traffic Act, 1930, without the licence required for the purpose of enabling it to be so used. The contention on behalf of the appellant may be succinctly stated as it appears to have been stated before the justices—namely, that this carriage, being a " public service vehicle " within the definition of that expression in s. 121 of the Act, falls within the first of the three classes of public service vehicles described in s. 61—namely, the class of stage carriages, as being a motor vehicle carrying passengers for hire or reward at separate fares, not carrying passengers stage by stage and stopping to pick up or set down passengers, and not being an express carriage as thereinafter defined. It is admitted that this vehicle was not carrying passengers stage by stage, and it is clearly found that it was carrying passengers for hire or reward at separate fares. As to s. 61, sub-s. 2, read according to its exact terms, although it is true it appears to have been to a great extent directed at a possible escape from the Act when a payment is made for something else besides carriage on the journey, yet that sub-section shows that whenever there are separate payments even in respect of a carriage which is the subject of a contract and is therefore a contract carriage according to the description in sub-s. 1, the vehicle becomes a stage carriage within the meaning of the section. Sub-s. 2 brings the vehicle into that class by the express enactment: " shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares." The sub-section provides in effect that in all cases where persons are carried in a motor vehicle for any journey in consideration of separate payments made by them, whether to the owner of the vehicle or to any other person, and whether or not including payment for anything besides carriage, the motor vehicle is to be deemed to be a stage carriage, unless it can be brought within the proviso to the sub-section as being used on a special occasion for the conveyance of a private party. Mr. Pratt, on behalf of the respondent, has constructed an ingenious argument based upon a careful scrutiny of the provisions of this somewhat complicated section, but he did not and could not argue that this vehicle was used on a special occasion or for the conveyance of a private party. In my opinion the justices arrived at a wrong decision, inasmuch as they should have convicted the respondent of the offence with which he was charged.

HUMPHREYS J. I agree. The difficulty I have found has been in determining whether the justices did or did not themselves take the view that the offence charged was committed by the respondent. It is stated under the heading of their opinion that having regard to the fact that the respective contentions, which they call the conflicting contentions, of the solicitors for the parties were put forward, and to the facts that the respondent did not know that he was breaking the law and had no intention of doing so, and that he had applied for a road service licence on a subsequent occasion, they were of the opinion that the best way to deal with the case in the circumstances was to dismiss it and express their strong disapproval of the way in which the respondent had acted. If I were satisfied that that statement meant that they found that the offence was proved, but under the provisions of the Probation of Offenders Act, 1907, they thought that, though the offence was proved, yet having regard to all the circumstances of the case, including the extenuating circumstances in which the offence was committed, it was inexpedient to inflict punishment upon the respondent, then I would agree that the case was one in which they could dismiss the information; but the statement is made in such a way that I cannot say that I am satisfied that that is what it means. I therefore concur in the view expressed by the other members of the Court as to the proper course to take in law on the facts of this case.

Appeal allowed. Case remitted.

Solicitor for appellant: *The Treasury Solicitor.*
Solicitor for respondent: *J. Messer Bennetts, Truro.*

J. R.

MALONEY *v.* ST. HELENS INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED.

C. A.
1932
Nov. 2, 3.

Master and Servant—Wages payable to Servant "during periods of sickness"—Whether "sickness" includes Disablement by Accident.

A wages award made in an arbitration between employers and employees affecting large bodies of workers contained a clause in these terms: "Wages during sickness. Wages to be paid as below during periods of sickness where absence from duty is properly vouched for by medical evidence:—A total of three weeks' full wages and three weeks' half wages in the aggregate in any one year."

The plaintiff was employed by the defendants at a weekly wage of 3*l.* under a contract which incorporated the above-quoted clause. In the course of his employment the plaintiff crushed his thumb and was in consequence absent from duty for six weeks, that absence being properly vouched for by medical evidence. He claimed to be paid under the clause three weeks' full wages and three weeks' half wages. The defendants, while admitting liability to pay compensation under the Workmen's Compensation Act, refused to acknowledge the plaintiff's claim under the clause, contending that it applied only where absence from duty was due to sickness caused by disease as distinguished from accident:—

Held, that the word "sickness" in the clause covered absence from duty owing to incapacity whether due to disease or accident, and therefore that the plaintiff was entitled to recover.

Decision of Divisional Court affirmed.

APPEAL from the Divisional Court.

The plaintiff Maloney was a grocer's assistant in the employment of the defendant co-operative society under an oral agreement which admittedly incorporated the terms of a wages award made in an arbitration between the North-Western Sectional Wages Council of the Co-operative Union, Ld., of the one part, and the National Union of Distributive

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and Allied Workers, the National Amalgamated Union of Shop Assistants, Warehousemen and Clerks, and the National Union of Clerks and Administrative Workers of the other part. The award fixed the rate of wages to be paid to different classes of workers, the rates varying in some cases according to the sales effected by them. The material clause of the award was headed " Wages during sickness," and it provided as follows : " Wages to be paid as below during periods of sickness where absence from duty is properly vouched for by medical evidence :—A total of three weeks' full wages and three weeks' half wages in the aggregate in any one year."

In the course of his employment with the defendants the plaintiff crushed his thumb, and was thereby incapacitated for work for six weeks, his absence from duty being properly vouched for by medical evidence. His wages were 3*l.* weekly, and he claimed to be entitled to be paid, under the above-quoted clause, full wages for three weeks and half wages for the other three weeks. The defendants, while admitting liability to pay compensation under the Workmen's Compensation Act, refused to acknowledge the plaintiff's claim under the clause of the award, contending that it applied only where absence from duty was due to sickness caused by disease. The plaintiff thereupon sued the defendants in the St. Helens County Court to recover wages under the clause.

The county court judge held that the word " sickness " in the clause applied only to absence from work due to disease, and did not apply to absence from work due to an accident. He accordingly gave judgment for the defendants.

On appeal, the Divisional Court (Swift and Macnaghten JJ.) reversed the decision of the county court judge, holding that the word " sickness " could not be construed in the limited sense applied by him.

The defendants appealed.

Bevan K.C., *Laski K.C.* and *F. B. Turner* for the appellants. The Divisional Court was wrong in holding that the word " sickness " in the clause under consideration covers incapacity caused by accident. It must be taken that the arbitrator was aware of the right to compensation for incapacity arising from an accident arising out of and in the course of a workman's employment given by the Workmen's Compensation Act; that it was therefore unnecessary to provide in the award for the contingency of incapacity arising from an accident, but that it was necessary to provide for the case of a workman being incapacitated by disease. In the Oxford English Dictionary "sickness" is defined as "the state of being sick or ill; the condition of suffering from some malady; illness, ill-health"; "a particular disease or malady"; "a disturbance of the stomach manifesting itself in retching and vomiting." In Johnson's Dictionary the word is defined as "state of being diseased; disease; malady; disorder in the organs of digestion." Other dictionaries give similar definitions of the word. We rely on these dictionary meanings as excluding the idea of incapacity by accident. Sect. 4 of the Poor Removal Act, 1846, speaks of "sickness or accident," and in *Reg.* v. *Huddersfield Inhabitants* (1) Lord Campbell C.J. said that "by 'sickness' in the statute, is meant disease." In *Reg.* v. *Bucknell Inhabitants* (2) incurable blindness was held to be sickness within the same section, for, as was there said, "a disease which is incurable or mortal is not the less sickness"; there the blindness was treated as a disease. By the Assurance Companies Act, 1909, s. 1 (*c*), "accident insurance business" is defined as "the issue of, or the undertaking of liability under, policies of insurance upon the happening of personal accidents, whether fatal or not, disease or sickness, or any class of personal accidents, disease or sickness." There "disease or sickness" is distinguished from "accident."

[SCRUTTON L.J. In s. 10, sub-s. 1 (*b*), of the National Health Insurance Act, 1924, the expression "sickness benefit" is used to denote payments to a person "while rendered incapable of work by some specific disease or by bodily or mental disablement."]

That is an artificial definition upon which reliance cannot be placed for the respondent. If in the clause to be construed it had been intended to include incapacity due to accident the apt phrase would have been "during periods of incapacity."

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(1) (1857) 7 E. & B. 794.

(2) (1854) 3 E. & B. 587.

[SLESSER L.J. The Court of Appeal in *Warburton* v. *Co-operative Wholesale Society* (1) applied the principle of *Cuckson* v. *Stones* (2)—namely, that a contract of service is not terminated by incapacity for work due to temporary illness, to the case of a workman temporarily incapacitated for work by reason of an accident.]

No question there arose as to the distinction between incapacity due to sickness and incapacity due to accident.

[SLESSER L.J. referred to the judgment of Channell J. in *Davies* v. *Ebbw Vale Urban District Council.* (3)]

Cave K.C. and *Gorman K.C.* for the respondent were not called upon.

SCRUTTON L.J. It seems to me that if the Workmen's Compensation Act is left out of consideration the point involved is quite a short one.

The question arises out of an award with regard to wages payable to a workman who is disabled from carrying out his duties. If he is disabled, what is to be done as to his wages ? The independent chairman of the National Conciliation Board for the co-operative service has made an award in which he has laid down what is to happen with regard to the wages of a workman during sickness ; and this he has done in these words : "Wages to be paid as below during periods of sickness where absence from duty is properly vouched for by medical evidence :—A total of three weeks' full wages and three weeks' half wages in the aggregate in any one year." The question is, what is there meant by the word "sickness" ? On the one hand it is said that "sickness" means incapacity to work resulting from disablement ; on the other, it is said that it means incapacity to work resulting from disease but not incapacity resulting from accident. In my view the meaning of English words not specially technical is a matter which we are quite competent to decide without recourse to the dictionary, which is merely useful in giving illustrations of the use of words. Of the word "sickness" there are three well-recognized meanings: (1.) the somewhat unpleasant meaning usually associated with a Channel crossing and which Dean Swift refers to thus: "You are sick of the Mulligrubs with eating chopt hay"; (2.) incapacity through disease, as in the phrase "sickness has increased in London during the past month"; (3.) the well-recognized meaning by which sickness is contrasted with health, that is, sickness is bodily incapacity as distinguished from bodily health. In the marriage service each of the spouses promises to cherish the other in sickness and in health; no one thinks of referring there to cases of accident. In prayers for sick people the clergyman does not qualify his petition by excluding those who have met with an accident. In Langland's Piers Plowman we find this: "Idel was I nevere . . . . in sikenesse ne in helthe." In my view the word "sickness" is very commonly used to denote a body in imperfect health, whether that condition arises from disease or accident. If I ask myself what the parties to the arbitration in which this award was made were thinking about, and what language they were familiar with when they used the word "sickness," I answer that they were considering the case of a workman who for some reason was prevented from being on duty and deciding what he should receive as wages during that period. While I agree that it is a statutory definition, I am impressed by the fact that since 1924 there has been a well-recognized phrase in use, "sickness benefit," which covers incapacity for work whether due to disease or bodily or mental disablement. Not only is that phrase contained in s. 10, sub-s. 1 (*b*), of the National Health Insurance Act, 1924, it is also constantly used in the newspapers with that extended meaning. Using that to enforce my view of one of the common meanings of the word "sickness," I come to the conclusion that when the chairman who made the award now under consideration used the word "sickness" he was thinking of a workman who was prevented from doing his work and earning his wages because his body was not in

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(1) [1917] 1 K. B. 663.
(2) (1858) 1 E. & E. 248.
(3) (1911) 75 J. P. 533.

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perfect health. Further, I cannot conceive any reason why an employer should say: "Mind, I will pay you wages if you are diseased, but not if you have met with an accident." I could understand an employer's objection if there were any suggestion of misconduct on the part of the workman causing disablement. Of that there is no suggestion here. I am invited to believe that employers and workmen have solemnly agreed to a distinction between a man not able to work because of an attack of influenza and a man who has fallen off his bicycle, and has received concussion, and on that account has to stop in bed. I cannot accept such a distinction. The Divisional Court came to a right conclusion, and the appeal must therefore be dismissed.

GREER L.J. I agree, but I do not think the question is a very easy one. I agree with Scrutton L.J. that there may be three possible meanings of the word "sickness," one of which we may leave out of account, because no one has contended that the word is confined to the case of a person who cannot keep his food on his stomach. The word may mean sickness caused by disease, or it may mean sickness as opposed to a condition of perfect health. I cannot myself draw any inspiration from the use of the word in the marriage service, but there are occasions in which the word "sickness" has been used as contradistinguished from a condition of perfect health. In the case of anything happening to a person causing pain it might be said that he was in a condition of sickness, whether the pain resulted from a blow on the head causing concussion, or whether it arose, as in this case, from a burst thumb; but the distinction sought to be made by the appellants ought not to be relevant to anything in this award. What were the parties to the award doing? They were fixing the wages to be paid while work was being done, and they were considering likewise whether there should be an extension of the wages to a time when work was not being done, and in this case they have used the words "wages to be paid . . . . during periods of sickness where absence from duty is properly vouched for by medical evidence." It seems obvious that the parties intended to include absence through sickness as the result of an accident. Take the case of a man suffering from concussion resulting from an accident, no one would say that any of the results of suffering pain from the accident should be excluded while the pain resulting from sickness should be included. The word "sickness" is perhaps a somewhat unfortunate one to use in order to bring about what I feel sure the parties intended. I think they intended to include the case of a man suffering pain and unable in consequence to work; whether the pain was due to some disease or to an accident being immaterial for this purpose. Notwithstanding the view taken by the very experienced and able county court judge I have come to the conclusion that the decision of the Divisional Court was right and that this appeal should be dismissed.

SLESSER L.J. I agree that this appeal should be dismissed. I begin by considering what is the actual language used in this award, which has become a term of the contract between the parties to this litigation. Under the heading "Wages during sickness" is this clause: "Wages to be paid as below during periods of sickness where absence from duty is properly vouched for by medical evidence:—A total of three weeks' full wages and three weeks' half wages in the aggregate in any one year." The first condition is that there should be an absence from duty "during periods of sickness." The word "sickness" must be correlated to the word "duty," as the wages clause is to apply to absence from duty. It refers to a period of absence from sickness limited to a total of three weeks' full wages and three weeks' half wages. At common law so long as the contract of employment is in existence and so long as there is no frustration the workman is entitled to his wages notwithstanding the fact that he is not actually working. That was decided in *Cuckson* v. *Stones* (1), where Lord Campbell C.J. said (2): "The contract being in force, we think that here there was no suspension of the weekly payments by reason of the plaintiff's illness

(1) 1 E. & E. 248.

(2) 1 E. & E. 257.

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and inability to work." I am by no means sure that the clause in question in this case is necessarily in favour of the workman. So long as he was in the appellants' employment he would be entitled to payment of his wages until the contract was terminated, whereas the clause appears to limit his right to three weeks' full wages and three weeks' half wages. In *Warburton* v. *Co-operative Wholesale Society* (1) Lord Cozens-Hardy M.R. said (2): "It has been long settled that a contract of service is not terminated by incapacity to work by reason of temporary illness, and that on return to work the man can recover his wages during the period of his absence: *Cuckson* v. *Stones*. (3) I think this principle must apply to a case where a workman is receiving compensation under the Workmen's Compensation Act." In the same case Scrutton L.J. also applied the doctrine of *Cuckson* v. *Stones* (3) where the incapacity arose from an accident. Unless therefore the language of the clause under consideration compels us to hold otherwise—and in my opinion it does not—there is no difference in my opinion between incapacity caused by sickness due to disease and incapacity caused by sickness due to accident. The county court judge misdirected himself by allowing his attention to be distracted by a consideration of the Workmen's Compensation Act. Several of the persons coming within the scope of the award may not come within the Workmen's Compensation Act in that their remuneration may exceed 350*l.* a year; consequently there is a real chance that those persons would not be entitled to claim under the Act. Again, under s. 9, sub-s. 1 (*a*), of the Act a person entitled to claim compensation is precluded from claiming in respect of the first three days if his incapacity lasts less than four weeks. There is no similar limitation under the clause we are considering. It was therefore misleading to import into the discussion of the respondent's rights a consideration of the Workmen's Compensation Act. The mere fact that this particular workman might have claimed

(1) [1917] 1 K. B. 663. (2) [1917] 1 K. B. 665.
(3) 1 E. & E. 248.

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the benefit of that Act is quite irrelevant. For these reasons I agree that the wider denotation put upon the word "sickness" by the Divisional Court and by my Lords is right.

Appeal dismissed.

Solicitors for appellants: *Haslewood, Hare & Co., for Aston, Harwood, Somers & San Garde, Manchester.*

Solicitors for respondent: *Church, Adams, Tatham & Co., for Cobbett, Wheeler & Cobbett, Manchester.*

J. S. H.

ISRAELSON *v.* DAWSON (PORT OF MANCHESTER INSURANCE COMPANY, LIMITED, GARNISHEES).

C. A.
1932
June 21.

[1931. I. 1265.]

Practice—Garnishee—Insurance (Motor Car)—Third Party Risks—Judgment by Third Party against Assured—Garnishee Proceedings against Insurers—Debt—Rules of the Supreme Court, Order XLV., *r.* 1.

An Insurance Company agreed to indemnify the owner of a motor car against liability for accidental injury to third persons caused by the use of the car. The policy contained conditions relating to the giving of notice of any accident and the obtaining of an award of an arbitrator, and gave the Company power to control or settle any proceedings which might be brought against the assured by an injured third party. Judgment having been recovered by such a person against the assured:—

Held, that the liability of the Company under the policy was not a debt which could be attached by the judgment creditor in garnishee proceedings under Order XLV., r. 1, of the Rules of the Supreme Court.

APPEAL from an order of Charles J. in Chambers.

On March 6, 1932, the plaintiff was knocked down and injured by a motor car hired by and in the possession of the defendant. The defendant was insured under a policy, dated April 17, 1930, numbered M. C. 16582, issued by the Port of Manchester Insurance Co., whereby the Company agreed to "indemnify the insured (or alternatively any relative or friend driving the car with the general consent and knowledge of the insured) as regards all sums for which the insured or such person driving shall become legally liable to pay in respect of :—

(*a*) Accidental bodily injury to any person . . . . and

(*b*) Accidental damage to property, ... caused by use of the car in the United Kingdom and Irish Free State."

The policy was subject to numerous conditions, including the following :—

"1. The insured or his legal personal representatives shall give notice in writing to the Head or any Branch Office of the Company immediately upon the occurrence of any accident and/or loss and/or damage with full particulars thereof (including names and addresses of witnesses of accident). Every letter, claim, writ, summons or process shall be notified or forwarded to the Head or any Branch Office of the Company immediately on receipt. Notice shall also be given in writing to the Head or any Branch Office of the Company as soon as the insured or his legal personal representatives shall have knowledge of any impending prosecution or inquest in connection with any accident for which there may be liability under this policy. In respect of this condition time shall be [of] the essence of the contract.

"2. The insured shall not, except at his own cost, negotiate, pay, settle, admit or repudiate any claim without the written consent of the Company. The Company shall be entitled to undertake, in the name and on behalf of the insured, the absolute conduct and control of any proceedings and any settlement of the same. The insured shall render to the Company all necessary information and assistance to enable the Company to settle or resist any claim or to institute proceedings." . . . .

"5. Upon any difference or dispute arising between the Company and the insured touching this policy or any claim arising hereunder or otherwise in any manner relating hereto, the same shall be referred to arbitration. Such arbitration shall be if the insured resides in England . . . . subject to the provisions of the Arbitration Act, 1889. . . . . The obtaining of an award in such arbitration shall be a condition precedent to any liability on the part of the Company." . . . .

The plaintiff brought an action against the defendant to recover damages for the personal injuries he had received and for damage to his clothing. The action came on for hearing on April 14, 1932, before a judge and a common jury and, the defendant not appearing, judgment was given for the plaintiff for 150*l.* The plaintiff then issued a summons for an order that all debts due from the Port of Manchester Insurance Company to the defendant should be attached to answer the judgment obtained as aforesaid. On May 5, 1932, Master Jelf made a garnishee order nisi. On May 20, 1932, Master Ball refused to make the order absolute. On appeal from this order Charles J., on May 27, 1932, ordered that the appeal should be allowed and that the judgment creditor and the garnishees should proceed to the trial of an issue.

The garnishees appealed.

H. D. Samuels for the appellants contended that the liability, if any, of the appellants under their policy did not constitute a debt due from them to the judgment debtor: *Randall* v. *Lithgow* (1); *Electric Printing Works Co.* v. *Cooper*. (2)

James Dickinson K.C. and *I. F. Reuben* for the respondent cited *Adams* v. *London General Insurance Co.* (3)

SCRUTTON L.J. This case suggests many questions for future discussion; but one short point arises at the outset. A person who has been personally injured has sued the person whom he alleges to be liable. He has claimed mostly for injuries to the person, but there is also a small claim for injuries to his clothes. The defendant denies that he or his servants or agents drove the car which caused the injuries. When the case was called on the defendant did not appear, and a verdict and judgment were given for the plaintiff for

(1) (1884) 12 Q. B. D. 525.

(2) (1923) 14 Ll. L. Rep. 125.

(3) (1932) 42 Ll. L. Rep. 56.

150*l*. Within a few days an application was made to set aside that judgment, and a new trial was ordered if the defendant brought the 150*l*. into Court, but whether the defendant paid this sum into Court is not clear. It also seems to be doubtful whether the defendant has made, or is pursuing, a claim against the Port of Manchester Insurance Company, who have insured him against third party risks. The matter before the Court arises thus: The plaintiff having got judgment for 150*l*. proposes to garnish a debt which he says is due to the defendant, that is to say the amount alleged to be due from the Insurance Company to the defendant.

The validity of this claim depends on whether a sum owing by an insurer to the assured is a sum in which the insurer "is indebted to such debtor." The plaintiff took out a summons for a garnishee order nisi that the Insurance Company should show cause why the debt due from them to the defendant should not be attached, and an order nisi was made. Master Ball refused to make the order absolute, or to order an issue. There was an appeal to the judge in Chambers, who has made the order absolute. In the proceedings in the Court below no reference was made to the words of the policy; there were no pleadings, and no notice was taken of the fact that the policy was issued before s. 38 of the Road Traffic Act, 1930, came into operation. (1) Charles J., however, made an order that the judgment creditor and the garnishees should proceed to the trial of an issue, without defining the issue and without directing who should be the plaintiff in the issue. Possibly he did this in order to ascertain whether the garnishees owed the defendant anything.

Now he could not make an order in that form unless there was a debt due to the judgment debtor. I have come to the conclusion that as between assured and underwriter there is no debt. There may be a breach of contract or an obligation to indemnify, but there is nothing which can be called a debt or an indebtedness within the meaning of Order XLV., r. 1.

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(1) By the Road Traffic Act, 1930 (Date of Commencement) Order (No. 1) 1930 (St. R. & O. 1930, No. 1003), ss. 35 to 40 of the Act came into operation on January 1, 1931.

It follows that there was no ground on which the learned judge, who was not referred to the cases which have been cited to us, could make the order.

I can see many difficulties arising on the words of the Road Traffic Act, 1930. This policy was taken out before s. 38 of that Act came into force. There may be a question whether under that section a policy entered into before the Act became operative is "a policy . . . . given for the purposes of this Part of this Act"; and there may be other questions about notice and about the clause in *Scott* v. *Avery* (1) or on the meaning of s. 36, sub-s. 4. I do not express any opinion upon the effect of the protection given by Part II. of the Act, and I observe that Swift J. in *Adams* v. *London General Insurance Co.* (2) expressed doubts whether the Legislature has used words which are sufficient to effect its intention. I decide this case on the ground that there is no attachable debt.

GREER L.J. I agree. When an application is made under Order XLV., r. 1, to attach a debt, it may be that the garnishee does not dispute his indebtedness, and then an order may go and execution may be issued to attach the debt at once; but the garnishee may say "I do dispute the debt," in which case, if a prima facie case of indebtedness is made out, an order should be made for the trial of an issue. A mere doubt as to which party will succeed is not enough to justify a refusal to make the order. But in order to found jurisdiction to make any order for attachment or for the trial of an issue, the applicant must establish that there is in law a debt due from the garnishee to the judgment debtor.

After consideration I have come to the conclusion that, whatever is due from the Insurance Company to the defendant, it is not a debt. The promise is in clause 1 of the policy. "The Company shall indemnify the insured, ... as regards all sums for which the insured . . . . shall become legally liable to pay in respect of:—(*a*) Accidental bodily injury to any person (including passengers in the car when being driven by the insured or by the insured's licensed driver) but excluding any person who is a member of the insured's household or in the insured's service and any person driving the car; and/or Accidental damage to property other than property actually belonging to or held in trust by or in the custody or control of the insured or being conveyed by the car in the United Kingdom and Irish Free State."

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(1) (1856) 5 H. L. C. 811.

(2) (1932) 42 Ll. L. Rep. 56.

Have the Insurance Company promised by this policy to pay the defendant in the action the 150*l.* for which judgment has been given? After full consideration I have come to the conclusion that they have not so promised, but that what they have promised is to indemnify him against such payment as he may have to make, and they may do that, not by paying him anything, but by paying to some other persons the amount the insured has to pay them. That is not a promise to pay him anything; it is one of the risks they undertake—namely, to indemnify him against legal liability incurred by him when driving a motor car. For these reasons I agree with the decision of Scrutton L.J.

I also agree in thinking that many difficulties will arise when it becomes necessary to define the liability of the Insurance Company under their policy; so many that in the exercise of my discretion I should not consider this a proper case for a garnishee order at all. The learned judge cannot be said to have exercised a discretion in this matter. He considered himself bound by the decision of Swift J. in *Adams* v. *London General Insurance Co.* (1) But that case did not hamper his discretion, because, apart from the alleged misrepresentation by the assured, there was no dispute as to the existence of the debt upon which the order was made.

Appeal allowed.

Solicitors for appellants: *L. Bingham & Co.*

Solicitors for respondents: *Saunders, Sobell & Co.*

(1) (1932) 42 Ll. L. Rep. 56.

W. H. G.

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Nov. 3, 4.

[1932. K. 119.]

Bill of Exchange—Material Alteration—Alteration of Place where Bill was drawn—Inland Bill changed into Foreign Bill—Alteration made without Assent of Acceptor—Avoidance of Bill—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *s.* 64.

The alteration of a complete bill of exchange, without the knowledge or consent of the acceptor, by changing the place of drawing from a place within, to a place outside, the British Islands, so that the bill becomes a foreign instead of an inland bill, is a material alteration within s. 64 of the Bills of Exchange Act, 1882, and the bill is thereby avoided.

Foster v. *Driscoll* [1929] 1 K. B. 470, 494, is not an authority to the contrary.

Appeal from a decision of Charles J.

The plaintiff claimed to recover against the defendant as acceptor of seven bills of exchange for 90*l.*, 50*l.*, 50*l.*, 50*l.*, 75*l.*, 75*l.*, and 75*l.* respectively, dated July 28, August 11, August 11, August 11, August 11, September 1, and September 3, 1911, respectively, all drawn by Radio Aktien-Gesellschaft Vormals E. Manger & Co., payable five months after those dates, to the order of the drawers, and indorsed to the plaintiff, and also for interest and noting charges.

The facts were that the Radio Aktien-Gesellschaft Vormals E. Manger, a company which carried on business in Deisslingen, in Germany, agreed to sell to the defendant, who carried on business at Kilburn, London, a quantity of wireless apparatus, to be paid for by cash against delivery order, and the Radio A.-G. drew the seven bills of exchange sued upon in payment of the price.

There was no evidence as to how the bills were drawn or accepted except what appeared on the bills themselves. They were made on stamped paper, and purported to be drawn in London, and bore a date. The Court drew the inference from the bills themselves that they were typed by the acceptor at the request of the proposed drawers, and that when the bills were accepted the name of the drawers was not on them. The bills were sent in that condition to the Radio A.-G. in Germany, and the name of the German company with the names of two of the directors were then put upon the bills as drawers.

The defendant alleged that the wireless apparatus was defective. The Radio A.-G. appeared to have got into difficulties, and indorsed the seven bills to the plaintiff, who had apparently financed them. The plaintiff tried to discount the bills with his bankers in Germany, but the German bank would not advance money on the bills unless they were changed into foreign bills by altering the place where they were drawn from "London" to "Deisslingen." The plaintiff took the bills back to the drawers, who made the alteration from "London" to "Deisslingen" as the place where the bills were drawn in the case of five of the bills. This alteration was made without the defendant's knowledge or consent. The bills were in due course presented for payment and dishonoured and protested, and the plaintiff thereupon brought the present action.

The defendant by his affidavit, made in answer to proceedings under Order XIV., said that five of the bills had been materially altered without his authority or assent by the deletion of the word "London" as the place where the bills were drawn and the substitution of the word "Deisslingen" therefor. He claimed that the alteration was a material alteration, and was apparent on the face of the bills, and that he was discharged from all liability thereon in accordance with s. 64, sub-s. 1, of the Bills of Exchange Act, 1882. (1) He brought into Court the sum of

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(1) Bills of Exchange Act, 1882, s. 3, sub-s. 4: "A bill is not invalid by reason—. . . . (c) That it does not specify the place where it is drawn or the place where it is payable."

Sect. 4, sub-s. 1: "An inland bill is a bill which is or on the face of it purports to be (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill."

Sect. 20, sub-s. 1: "Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a primâ facie authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a primâ facie authority to

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151*l.* 4*s.* 1*d.*, the amount claimed in respect of the two bills which had not been altered.

Charles J. held that the alteration of the place where the bills were drawn was a material alteration within s. 64 of the Bills of Exchange Act, 1882, as the bills were by the alteration changed from inland bills into foreign bills, and were therefore avoided by s. 64.

The plaintiff appealed.

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fill up the omission in any way he thinks fit."

Sect. 51, sub-s. 1: "Where an inland bill has been dishonoured it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser."

Sub-s. 2: "Where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment it must be duly protested for non-payment. If it be not so protested the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonour is unnecessary."

Sect. 52, sub-s. 1: "When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable."

Sub-s. 3: "In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him."

Sect. 57: "Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:

(1.) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—

(*a*) The amount of the bill;

(*b*) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case;

(*c*) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest."

Sect. 64, sub-s. 1: "Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers.

Provided that, where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour."

Sub-s. 2: "In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent."

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van den Berg K.C. and *Harold Simmons* for the appellant. The alteration of the bills in the present case was not a material alteration within s. 64 of the Bills of Exchange Act, 1882. It is stated in Halsbury's Laws of England, 2nd ed., vol. 2, p. 714, that: "The following alterations have been held to be immaterial . . . . alteration of the place where the bill was drawn," and *Foster* v. *Driscoll* (1) is cited as an authority for that proposition. Scrutton L.J. stated the reasons for that decision as follows (2): "The bill when handed over on October 26 was accepted but had no drawer's name and no date. It had 'London' lithographed as its place of origin and was intended to have four British subjects as its parties. If Lindsay had inserted his name as drawer without more the bill would have been invalid as an inland bill on unstamped paper. But the bill was sent to Lindsay at Lausanne and at Lausanne he inserted his name as drawer. He therefore struck out 'London,' which was not the place where he was completing the bill, and inserted 'Lausanne,' the true place. This would make the bill a foreign bill and valid. When the document was altered it was not a bill; it was being completed by inserting (inter alia) the true place where it became a bill. I am of opinion that s. 64 of the Bills of Exchange Act, 1882, does not apply to such a transaction, and I take the view of the transaction which makes the bill valid rather than the one which destroys it." That exactly applies to and covers the present case. The bills were typed in England and had on them the words "London," with a date and "Pay to the order of" with the drawers' name in blank, and they were accepted by the acceptor in that form and sent to the drawers in Germany. The person in possession of the bills had, therefore, under s. 20 of the Bills of Exchange Act, 1882, prima facie authority to fill up any omission in the bills in any way he thought fit, and the German bank, knowing the true facts as to where the bills were drawn, wanted those facts to be stated on the bills. The alteration of the bills by the drawers, so that the true place where the bills were drawn should appear on the face of the bills, was not a material alteration of the bills within s. 64, sub-s. 1, of the Act of 1882. In sub-s. 2 of s. 64 the Legislature sets out the alterations of a bill which are to be considered material, and inasmuch as the alteration of the place where a bill is drawn is not included in the list of material alterations, the inference is that the Legislature did not regard such an alteration as material.

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(1) [1929] 1 K. B. 470, 494.

(2) Ibid. 494.

[SCRUTTON L.J. Sub-s. 2 of s. 64 does not say that the alteration of the name of the drawer is material, therefore you cannot press that section too far.]

[GREER L.J. Is it not the fact that all the instances set out in sub-s. 2 of s. 64 as being material alterations of a bill have been the subject of judicial decision, but this particular point has not been the subject of judicial decision ?]

Sect. 3 of the Act of 1882 sets out what is necessary in order to create a valid bill of exchange, and sub-s. 4 (*c*) provides that a bill is not to be considered invalid because it does not state the place where it is drawn. This shows that the Legislature did not consider the place of drawing as one of the material facts in relation to a bill. If it is not necessary that the place where the bill is drawn should be stated in the bill in order that the bill should be valid it is equally immaterial if a place of drawing has been specified in the bill and subsequently altered.

[SCRUTTON L.J. The Legislature treated the place of drawing as being a material portion of the bill, because in s. 4, sub-s. 1, the question whether a bill is an inland or a foreign bill is made to depend upon that statement.]

The alteration in the place of drawing of the bills took place with the assent of all parties to the bills. An assent may be implied. If a bill is accepted in England and then sent to the drawer in Germany to draw the bill in Germany, the acceptor gives an implied authority to the drawer to create a foreign bill or to correct a mistake in the bill. The correction of a bill in order to make it accord with the true facts is not a material alteration of the bill.

[Scrutton L.J. Here the drawers received bills made out on stamped paper as inland bills and purporting to be drawn in London. Where is the implied authority ?]

There is an implied authority from the principle of law which requires the drawer to state truthfully where the bills are signed. There is no question but that the drawers had authority to make the alteration before they completed the bills, and if they could have made the alteration then there is no reason why they could not subsequently correct a mistake in the bills. The statement in Chalmers' Bills of Exchange, 10th ed., p. 258, that "where a bill appears to have been altered, or there are marks of erasure on it, the party seeking to enforce the instrument is bound to give evidence to show that it is not avoided thereby" is not accurate. The person seeking to enforce the instrument must call evidence to show the circumstances in which the alteration was made, it then becomes a question of law for the Court to say whether or not that alteration is material: *Knight* v. *Clements* (1); *Clifford* v. *Parker* (2); *Tatum* v. *Catomore* (3); *Cariss* v. *Tattersall.* (4) In *Peizer* v. *Lefkowitz* (5) Kennedy L.J. expressed the view that "the question of the materiality of an alteration in a bill of exchange or other negotiable instrument is a question of law." In *Vance* v. *Lowther* (6) Pollock B. said: "Any material alteration of a bill or note invalidates it, and the question is, what is the true principle on which the materiality must be determined. . . . . I think . . . . we ought to look at the question of materiality with reference to the contract itself, and not with reference to the surrounding circumstances." The test as to the materiality of an alteration of a bill of exchange was laid down in *Suffell* v. *Bank of England* (7) by Brett L.J. as follows (8): "Any alteration of any instrument seems to me to be material which would alter the business effect of the instrument if used for any ordinary business purpose for which such an instrument or any part of it is used." Cotton L.J. defined

(1) (1838) 8 Ad. & E. 215, 220.
(2) (1841) 2 M. & Gr. 909.
(3) (1851) 16 Q. B. 745, 746.
(4) (1841) 2 M. & Gr. 890.
(5) [1912] 2 K. B. 235, 242.
(6) (1876) 1 Ex. D. 176, 178.
(7) (1882) 9 Q. B. D. 555.
(8) Ibid. 568.

the test in this way (1): "The question here is whether the alteration, although not an alteration of the contract, is nevertheless an alteration of the instrument in a material way." The alteration of a bill from an inland bill to a foreign bill is not made a material alteration of the bill merely by reason of the difference in the law with regard to the necessity for protest in the case of the two kinds of bills. A protest is merely the machinery required by English law for the purpose of proof, and is a matter of procedure, but it does not alter the contract contained in the instrument. In *Simmons* v. *Taylor* (2) the Exchequer Chamber decided that the erasing of the crossing on a crossed cheque did not vitiate the cheque. Cotton L.J., dealing with that case in *Suffell* v. *Bank of England* (1), said: "That decision was on the ground that the erasing was not a material alteration even if the crossing was part of the cheque, but that it was not part of the cheque but a mere superadded direction to the banker." *Leroux* v. *Brown* (3) shows that the Courts have always recognized a distinction between the contract contained in an instrument and something that has been superadded as to the mode of proof. It was there held that an action will not lie in the Courts of this country to enforce an oral agreement made in France (and valid there), which, if made here, could not, by reason of the Statute of Frauds, have been sued upon.

[SCRUTTON L.J. There may be a further difference between an inland bill and a foreign bill with regard to the stamping of the bill under s. 35 of the Stamp Act, 1891, because an inland bill might be invalidated by the alteration of the place of drawing unless it were further stamped by adhesive stamps of sufficient amount being affixed thereto.]

The requirements of s. 35 of the Stamp Act, 1891, were complied with in the present case before the bills were presented for payment. The documents were sent to Germany to be drawn there as foreign bills. When the documents left England they were not bills notwithstanding they were written on stamped paper, and therefore there has been no change or alteration in the instruments. They were drawn or made out of the United Kingdom.

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(1) 9 Q. B. D. 574.
(2) (1858) 4 C. B. (N. S.) 463.
(3) (1852) 12 C. B. 801.

[SCRUTTON L.J. I think the German bankers must have regarded the alteration as a material alteration, because they refused to take the bills unless they were altered with regard to the place where the bills were drawn, and took them after the alteration had been made. They knew the requirements of German law.]

It is not safe to draw any inference from their action, because the German bank discounted two of the bills although they had not been altered with regard to the place where they were drawn. *Foster* v. *Driscoll* (1) shows that there was an implied authority to the drawers before they signed the bills to state the true state of facts—namely, that the bills were drawn in Germany. The alteration of a bill merely to correct a mistake will not avoid it under the Stamp Act: Byles on Bills, 19th ed., p. 290. In *Brutt* v. *Picard* (2) a correction was made in the date of a bill by the agent of the drawer and acceptor, to whom it had been given to be delivered to the indorsee, without their knowledge or consent, and it was held that such alteration did not vacate the bill. A Court of equity would have granted rectification of the document and corrected the mistake, and would not have granted specific performance of it: *Webster* v. *Cecil.* (3)

J. B. Herbert for the respondent. There was no authority either express or implied given by the acceptor of these bills to the drawers to alter the place of drawing of the bills. There was no evidence whether the bills were drawn in London or in Germany, but assuming that the bills when sent to Germany had the respondent's name as acceptor upon them but not the name of the drawers, still no authority could be implied to alter the place of drawing. The bills were typed out on pieces of paper impressed with the appropriate English bill stamp and with the word "London" written upon them as the place at which the bills purported to have been drawn, and therefore the only implied authority which the drawers had was to draw the bills as inland bills. Authority was not thereby given to the drawers to alter the word "London" to "Deisslingen" as the place where the bills were drawn, and so alter the bills from inland bills to foreign bills. Sect. 20 of the Bills of Exchange Act, 1882, appears to define the only occasion when the person to whom the document comes is entitled to fill up the blanks in the document. In *Foster* v. *Driscoll* (1) it was held that a person to whom a document came which was not a complete bill had authority to alter the place of drawing of the bill, but the decision would have been otherwise if the document at the time the alteration was made had been a complete bill.

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(1) [1929] 1 K. B. 470, 494.

(2) (1824) Ry. & M. 37.

(3) (1861) 30 Beav. 62.

[GREER L.J. According to the decision in *Foster* v. *Driscoll* (1), if the alteration in the name of the place of drawing of a bill is made before the drawer has signed the bill, it would notwithstanding the alteration be a good bill. Why should there be any different result if the alteration is made after the drawer has signed the bill, and when it is therefore a complete bill, but before anything more has been done with regard to it?]

The drawer would only have authority to alter the document because at that time it is not a complete bill, but quite different considerations apply after the inchoate document has been turned into a complete bill and has been issued. The bills in the present case were issued as complete bills to the plaintiff who indorsed them to the German bank, and the German bank subsequently insisted upon the alteration being made as to the place of drawing of the bills. It is true that it has been held that the correction of a mistake in a bill will not invalidate the bill, but in the present case there was no mistake in the bills, it was intended by the acceptor that they should be drawn as inland bills. The alteration of the place of drawing of the bills was a material alteration of the bills: see *Suffell* v. *Bank of England* (2), where Brett L.J. said (3): "Any alteration of any instrument seems to me to be material which would alter the business effect of the instrument if used for any ordinary business purpose for which such an instrument or any part of it is used." It is immaterial whether the alteration be for the benefit or the reverse of the person setting it up. In *Gardner* v. *Walsh* (1) the defendant had been one of two makers of a promissory note. Subsequently the note was altered by the plaintiff procuring another person to sign it as a joint and several maker. In an action on the note Lord Campbell C.J. said (2): "But we conceive that he [the defendant] is discharged from his liability if the altered instrument, supposing it be genuine, would operate differently from the original instrument, whether the alteration be or be not to his prejudice." It is not even necessary to show that either of the parties has been affected by the alteration. It was held in *Suffell* v. *Bank of England* (3) that it is sufficient to invalidate a document if the document is altered in a business sense, even although the alteration does not alter or affect the contract contained in the document. A protest is not a mere matter of machinery, inasmuch as it involves the acceptor in a liability—in a case where the money is payable by the acceptor—to pay the expenses of the protest, where a protest is necessary, as it is in the case of foreign bills but not in the case of inland bills: see s. 51, sub-s. 2; s. 52, sub-s. 3, and s. 57, sub-s. 1 (*c*), of the Bills of Exchange Act, 1882.

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(1) [1929] 1 K. B. 470.

(2) 9 Q. B. D. 555.

(3) Ibid. 568.

[He was stopped.]

van den Berg K.C. replied.

SCRUTTON L.J. In this case there are no merits, but, as it raises a general principle applicable to negotiable instruments, it appears to me to be of some importance.

It arises in this way. An English merchant named Dicks had bought some wireless apparatus from a Radio Company which carries on business in Germany, and the judge states in his judgment, although it does not appear on the pleadings, that Mr. Dicks made some complaints about the loud speakers he had bought, because they would not speak.

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(1) (1855) 5 El. & Bl. 83.

(2) Ibid. 89.

(3) 9 Q. B. D. 555.

That, however, is not the point that was raised in the case, because Mr. Dicks had accepted certain bills of exchange, or documents which would on completion become bills of exchange, for the price of those loud speakers, and he was sued on the bills by a gentleman named Koch who, so far as I can understand, had financed the Radio Company and had put his name on the bills in order that a German bank might discount them.

The only point that was taken by the defendant Dicks, in answer to the claim of Koch, was this: the defendant said that on the face of five of the seven bills on which the plaintiff Koch was suing him there was an apparent alteration, in that the place of drawing on the bills had been altered from " London " to " Deisslingen," a place in Germany, and the defendant said that that alteration was a material alteration and avoided the bills under s. 64 of the Bills of Exchange Act, 1882. Two of the bills had not been altered, and as to those two bills the defendant paid the amount claimed into Court, but he defended the action as regards the other five bills. The learned judge who tried the action has found that this defence was good.

There is great obscurity as to what exactly happened in England, because no evidence was really given about it. Mr. Herbert, for the defendant, says that the reason why no evidence was given about it was because the point which Mr. van den Berg, for the plaintiff, has raised here—namely, that the circumstances under which the bills were accepted gave authority to the plaintiff who held the bills to alter the bills, was not raised in the Court below. If it had been raised, evidence could have been called as to what happened in London. No such point was taken, and in consequence we have no evidence as to what happened in London, except such as we can draw from looking at the bills themselves. Now the bills themselves are on stamped paper, which would be necessary if the bills were inland bills under the Bills of Exchange Act. In the condition in which they were when they were accepted they were said to be drawn in London. There appears on each of the bills the word " London " and a date, and they were expressed to be payable so many months after that date. The typing of the body of the order—on such and such a date pay to the order of the Radio Company—is obviously the same typing as the typing in which the bill is "accepted payable at Barclays Bank, Brondesbury Branch." Although it is rather an odd performance, I draw the inference that the bills were typed by the acceptor, no doubt at the request of someone on behalf of the proposed drawers. Whether that request was made by letter, or whether it was made by some representative of the Radio Company appearing in London and seeing Mr. Dicks and asking him to do this, there is no evidence at all, and we are left in the dark as to what exactly happened. I think, however, that we can gather from the bills themselves that when each bill was accepted there was no drawer's name on it, and I assume, therefore, that the bills come within the language of s. 20 of the Bills of Exchange Act, 1882: "when a bill is wanting in any material particular, the person in possession of it has a primâ facie authority to fill up the omission in any way he thinks fit." It looks as if, and my judgment proceeds on that assumption, when Mr. Dicks accepted these bills the drawer's name was not on them. The bills in that condition were sent to the Radio Company in Germany, and again I infer from the bills that when each bill was received by the Radio Company in Germany the name of the company and the signatures of two directors were put upon the bills as the names of the drawers.

The next thing was to obtain money for the bills, and again I must proceed on the assumption, although Mr. Koch's evidence is very obscure, that Mr. Koch, who has apparently financed the Radio Company, was ready to assist that company to raise some money by putting his name on the bills as indorser.

The bills were at that time complete bills with the drawer's name filled in, and on their face were inland bills, as appears from s. 4, sub-s. 1, of the Bills of Exchange Act, 1882. Mr. Koch went to a German bank with those bills, and the bank refused to advance any money on those bills, even with Mr. Koch's name on the back, but were willing to make an advance upon them if the place of drawing the bills was altered from "London" to "Deisslingen." Mr. Koch in consequence took the bills back to the Radio Company and that company thereupon altered the bills, which were then complete bills, by altering the place of drawing from "London" to "Deisslingen." This alteration, it seems to me, on the definition in s. 4 of the Bills of Exchange Act, 1882, clearly turned the bills, if they were at that time inland bills, into foreign bills.

Now comes the question whether that alteration discharged the acceptor. Sect. 64 of the Bills of Exchange Act, 1882, says: "Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers." The question raised in the Court below was whether this alteration is a material alteration. It is an apparent alteration, because it appears quite clearly on the face of the bills that the word "London" has been struck out—it is still visible on the bills—and the directors of the Radio Company have made it quite clear that the word has been altered by putting on all the bills, except the two that were not altered, the word "changed," and signing the alteration, so that they are clearly bills that have been altered. Have they been materially altered? Sub-s. 2 of s. 64 says: "In particular, the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent." Mr. van den Berg says quite truly that this sub-section does not mention place of drawing, and he further says, which is also quite true, that sub-s. 4 of s. 3 provides that: "A bill is not invalid by reason . . . . (c) that it does not specify the place where it is drawn." His contention is that it would not have mattered if no place of drawing had been specified in the bills, and consequently that it is not material that a place of drawing has been specified in the bill and subsequently altered. Sect. 4, sub-s. 1, defines the difference between an inland bill and a foreign bill in the following way: "An inland bill is a bill which is or on the face of it purports to be (*a*) both drawn and payable within the British Islands, or (*b*) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill." These bills, when they were accepted, and when the drawer's name was subsequently inserted, purported to be both drawn and payable within the British Islands, and consequently in the state in which they were when they were completed they were inland bills. By striking out "London" as the place of drawing and inserting "Deisslingen" they ceased to be drawn within the British Islands and became foreign bills. There undoubtedly are, or may be, differences in English law between an inland bill and a foreign bill. One difference is with regard to the necessity for protest which arises when a foreign bill is dishonoured, but not in the case of an inland bill, and the expenses of the protest. It is a small matter but it is a difference between the two kinds of bills. There may be another difference—I do not wish to speak too positively as to the exact nature of the difference—under the Stamp Act with regard to stamp duty, because stamp duty has to be paid in a different way on a foreign bill from that which is necessary on an inland bill, where it must be paid, as it was originally in this case, by an impressed stamp.

It only remains therefore to consider whether an alteration which affects the rights as between the parties to a bill is a material alteration. I am of opinion that any such alteration, even though it may be prejudicial to the party making the alteration, is an alteration which renders the bill void. I think the law in that respect is the same as was expressed by Lord Campbell in *Gardner* v. *Walsh* (1) as follows: "But we conceive that he [the defendant] is discharged from his liability if the altered instrument, supposing it to be genuine, would operate differently from the original instrument,

(1) 5 El. & Bl. 83, 89.

whether the alteration be or be not to his prejudice." That was a case of alteration in a promissory note which the defendant had signed as a surety. I decide this case chiefly on the fact that, in my view, the alteration of an inland bill to a foreign bill must be material, because it must alter to some extent the rights and obligations of the parties to the bill. But I am also inclined to decide this case, and do, on the following ground: I am very much impressed by the fact that the German bankers, who know the German law with regard to bills of exchange, would not deal with these bills unless they were altered so that their place of drawing was changed from "London" to a place in Germany, and I notice on the bills that some things have been done which are obviously not necessary by English law, and which must therefore have been necessary in order to comply with German law, and their presence, or absence, may involve material alterations in the rights or duties of the parties to the bills. No evidence was given as to German law with regard to bills of exchange, and, in my view, the onus is on a person who claims on a bill which is manifestly altered of showing that the alterations do not alter the liability of the parties to the bill, and where those rights may be governed by a foreign law, he must show that by the foreign law the alterations do not in any way affect the rights and liabilities of the parties to the bill.

There is only one matter further I ought to mention. The learned judge below refers to a contention advanced on behalf of Mr. Koch which has also been raised before us—namely, that the decision of this Court in *Foster* v. *Driscoll* (1), and particularly a passage in my judgment (2), shows that the alteration of the place of drawing of these bills would not be material. In my view *Foster* v. *Driscoll* (1) does not apply to this case, because the facts there were quite different from those in the present case. The alteration of the place drawing from "London," which was in a lithographed form, to "Lausanne," where the bill was in fact drawn, was made while the bill was an incomplete instrument, a

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(1) [1929] 1 K. B. 470.

(2) Ibid. 494.

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purported English bill on unstamped paper, with no time for payment filled in; it was not a complete bill at the time the alteration was made. The alteration, such as it was, striking out the word "London" from the lithographed form and inserting the word "Lausanne," was made to an instrument which was not a bill. In the present case the alteration was made to a complete bill; the names of the drawers had previously been put in, and on the face of it the bill was then a complete inland bill; that complete bill was subsequently altered by striking out the purported place of drawing in the bill and substituting another place of drawing. In my view that is quite a different position from that which occurred in *Foster* v. *Driscoll* (1), and the passage from my judgment (2) in that case which was relied upon by Mr. van den Berg in argument is no authority for the proposition that altering the place of drawing after a bill has been completed in an immaterial matter, and does not help at all.

For these reasons, which I have gone into at some length, not because there are any particular merits in this case, but because the general principles are, I think, of some importance with regard to negotiable instruments, I am of opinion that Charles J. came to a correct conclusion, and the appeal must be dismissed with costs.

Greer L.J. I have with great reluctance come to a similar conclusion, and my reluctance is due to the fact that the liability of the acceptor of these bills is in no respect larger or different from what it would have been if the bills were rightly held to have been drawn as German bills. His liability to pay is exactly the same whether the bills are inland bills or foreign bills, because as against the acceptor it is not necessary to protest a foreign bill, a protest is only necessary in order to make the drawer or subsequent indorsers liable on the bill; but of course the acceptor is entitled to take any objection which in law is open to him to his liability on the bills, leaving him, if the defence set up is a good defence,

(1) [1929] 1 K. B. 470.

(2) Ibid. 494.

liable on the original consideration, as he has not met his liability on the bill.

The first question which arises in this appeal is, whether or not there was a material alteration in the bills, and the second question is whether, assuming that there has been a material alteration, that alteration was authorized by the only person we are here concerned with—namely, the acceptor—before the issue of the bills. On the first question, we were referred to a statement of the law in the article on Bills of Exchange and Promissory Notes in the 2nd ed. of Halsbury's Laws of England, vol. 2, p. 714, a statement for which, though not strictly accurate, I accept full responsibility. It is in these terms: "On the other hand, the following alterations have been held to be immaterial: the addition of a wrong date for the maturity of the instrument, the elimination of the words 'or order' in an instrument payable to order, the conversion of an instrument payable to the payee or order into one payable to him or bearer, the alteration of the drawee's style when wrongly stated in the bill to his true style as signed by him in his acceptance, or alteration of the place where the bill was drawn." We are only concerned with the last few words of that long sentence, "alteration of the place where the bill was drawn." Now I have no doubt, in nine cases out of ten, that accurately represents the law. If a bill be drawn in London and is altered so that it appears to have been drawn, say, in Southampton, there would not be an alteration of anything which was material to the liability of any one upon the bill, but if it is altered as between London and a place in Germany, that raises quite a different situation, because the statute relating to Bills of Exchange has certain provisions which apply to inland bills, and different provisions which apply to foreign bills. It is not ad rem to say that as between the parties to the litigation no alteration is made by reason of the change of the place where the bill was drawn. A bill of exchange is a contract that may apply between a number of parties who have had no direct relation with one another. This is done by means of indorsement, and once the contract on the bill has become complete, and

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irrevocable by delivery of the instrument, other parties may come into that contract originally made between the drawer and the acceptor, and if a bill has been so altered as to make it invalid as between the subsequent parties, it seems to me impossible to say that such an alteration is not a material alteration of the bill. It is immaterial, as was pointed out in *Gardner* v. *Walsh* (1), to which my Lord has referred, whether the alteration of the bill makes it more or less favourable to the holder who seeks to enforce the obligations, if in fact it alters the legal incidence of the bill. As against the drawers the alteration of the bills in the present case did alter the legal incidence of the bills; it made the drawers liable for what they would not otherwise be liable for—namely, to pay the sums due, if called upon, for protest of the bills, and although it is an alteration which the drawers made, an alteration which was for the benefit of every one else and which was to the detriment of the drawers, still that does not make it any the less a material alteration of the bill, which is a contract of the kind I have mentioned.

The only doubt I have had about this part of the case is whether or not some of the observations which were made in the case cited in Halsbury's Laws of England—namely, *Foster* v. *Driscoll* (2)—do not seem to involve the proposition that an alteration of the place of the drawing of a bill from one country to another is not a material alteration, because it looks as if the facts in this case were identical with the facts in *Driscoll's* case (2), with one exception—namely, that it may be said in the present case it was too late, when the alteration was made, to undo the mistake that had been made by those who signed the bills as drawers on behalf of the Radio Company. If, however, instead of altering the bills after they had passed into the hands of the holder and of the holder's bank, the drawers had recalled them while they were in the hands of a messenger before they had passed to the holder and had then altered them, it would seem that that alteration would have been effective, and if the bills had then passed into circulation they would have been good bills. But that case does not seem to me to apply to the facts of this case when they are carefully considered, because in this case the very thing which was intended to be rendered illegal or unauthorized and ineffective by the Bills of Exchange Act was done after the documents became complete bills and while they were in the hands of the holder, and not before. For these reasons, though with some reluctance, I think the point made on behalf of the appellant that the alteration was not a material alteration necessarily fails.

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(1) 5 El. & Bl. 83, 89.

(2) [1929] 1 K. B. 470, 494.

The other question is a question of some difficulty also. Can we say that sufficient facts have been established to enable the Court to conclude that the drawers were authorized by the acceptor and the holder to make this alteration in the bills ? There can be no doubt whatever that the holder was quite content that the alteration should be made, because he took the bills back to the drawers in order that the alteration should be made. The only point left is whether we can say authority was given in advance by the acceptor, who was not present at the alteration, which would enable the drawers, or any one who was interested, to say that the alteration made by the drawers was made with the authority and consent of the acceptor. These bills had on them on the top of the bills as the place of drawing the word "London," with a date. Now a bill is primarily a document which is supposed to be drawn by the drawer of the bill addressed to the acceptor, and when you find the name of a place on the top of the bill before the words which create the obligation of the acceptor to accept and pay, it necessarily means that that is the address which the drawer is putting on the bill ; or, if the bill is written out before it comes to the hands of the drawer, the address which it is intended that the drawer should put as his address upon the bill. I think by the acceptor sending the bills in the present case over to Germany in this form with the word "London" upon the top of them as the address which the acceptor expected the drawers to put in the bills, the drawers had only authority to make these bills in a form in which they would purport to be inland bills, and would therefore have the effect of inland bills, although every one might learn afterwards that they were in fact drawn in Germany. I cannot draw the inference we have been asked to draw that the German drawers had authority in the first instance to draw the bills in any form other than that in which they were sent over to Germany—namely, as bills purporting to be English inland bills.

No doubt, on the authority of *Driscoll's* case (1), there would have been nothing fatal to the bills if they had been altered in the first instance so as to make them bills drawn in Deisslingen, notwithstanding the fact that the name "London" was still upon the bills. They would then have been foreign bills and would have passed subject to the incidents of foreign bills, and would have been available in the hands of the holders as foreign bills, but possibly there might have been some claim on behalf of the acceptor if he had suffered damage by reason of the drawers having, without his authority, converted what were intended to be inland bills into foreign bills. But it is difficult to see how any damages could in fact arise, not even the amount of the expenses of protest. However that may be, that is a different situation from the situation created by altering the bills after they had in fact become bills by being issued to a holder.

For these reasons, though with great regret, because there are absolutely no merits in the defence put forward by the acceptor of these bills, I agree that this judgment must stand and the appeal must be dismissed with costs.

SLESSER L.J. I agree. In this case these bills were in fact drawn in Germany; they, however, contained on the face of them as the place of drawing "London," and were under s. 4, sub-s. 1, of the Bills of Exchange Act, 1882, inland bills, because, on the face of them, they purported to be both drawn and payable within the British Islands. After the bills became complete instruments, both the names of the acceptor and of the drawers being upon them, the name of the place of drawing was altered from "London" to the name of a place in Germany called "Deisslingen," and by that alteration the bills became foreign bills within the meaning of the Bills of Exchange Act, 1882.

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(1) [1929] 1 K. B. 470.

The question we have to consider is whether that alteration was a material alteration within the meaning of s. 64 of the Bills of Exchange Act, 1882. The particular point we have to consider appears never to have been specifically decided. Mr. van den Berg has called our attention to the fact that sub-s. 2 of s. 64 contains a number of instances of alterations which are stated in that sub-section to be material. The sub-section provides that: "In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent." Those particular instances appear to be a collection of instances of alterations which have been judicially decided from time to time to be material. The particular alteration here made—namely, the alteration of the place of drawing of the bills, has not been the subject of judicial consideration. I have come to the conclusion that this is a material alteration, not because the name of the place of drawing has been altered, but because in the particular circumstances of this case the alteration of the name of the place of drawing has altered the bills from inland bills to foreign bills. It may well be that an alteration of the name of the place of drawing, say, from London to Ealing, or from Birmingham to Bristol, may not be a material alteration, but an alteration which produces a different order of bill altogether must, in my opinion, of necessity be a material alteration. Indeed, in a way, the alteration is more essentially material than the instances set out in sub-s. 2 of s. 64, because those are alterations as to the facts of the particular bills concerned, alterations of date, sums payable, and the like, but here the alteration is introducing a general change in the whole nature of the bills under the statute, not only as between the parties, but as a matter of general law. I find it impossible to think, when something has been done which as a matter of general law alters the whole

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nature of the instrument, that it can possibly be said that such an alteration is not a material alteration. For that reason, because these bills have been turned from inland bills into foreign bills, I think it must of necessity follow that the alteration must be material. As my Lord has pointed out, there is ample authority for the proposition that this question must not be looked at from the point of view of the benefit or detriment of the parties; it is the alteration of the bill as such which decides the matter. This language as to the material alteration of the bill is from a very ancient authority; it is derived, I think, from the second resolution in *Pigot's Case* (1): "that when any deed is altered in a point material, by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, rasing, or by drawing of a pen through a line or through the midst of any material word, that the deed thereby becomes void." That case has been often followed and referred to, more particularly on the authority of the case of *Master* v. *Miller* (2), which extends the doctrine from a deed to a bill of exchange. I take the word "material" here to mean, in addition to the matters specifically mentioned in sub-s. 2 of s. 64, any such alteration which would produce a change in the legal nature of the instrument. It in no way conflicts with *Foster* v. *Driscoll* (3), which was dealing with the case of an instrument which had not yet become a complete bill. Here the instruments are stated on their face to be drawn in London; it is only after they had become complete bills that there was an alteration made in them, and as that alteration is a material alteration, and as, in my view, it cannot possibly here be said that the assent of the party liable on the bill had been obtained, it follows that s. 64 of the Bills of Exchange Act, 1882, is a complete defence in this case, and therefore this appea must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Leader, Plunkett & Leader.*

Solicitors for respondent: *Alexander Fine, Hawkins & Co.*

(1) (1614) 11 Co. Rep. 26b.

(2) (1791) 4 T. R. 320; 1 Sm. L. C. (13th ed.), 780.

(3) [1929] 1 K. B. 470.

R. F. S.

BUCKLAND *v.* THE KING. (1)

1932
Nov. 2, 3, 4, 8.

[1932. B. 453.]

Customs—Importation of Goods—Cinematograph Films—Liability to Entry—"Baggage of passengers"—Detention by Customs—New Duty coming into Force—Customs Consolidation Act, 1876 (39 *&* 40 *Vict. c.* 36), *s.* 66—*Finance Act,* 1901 (1 *Edw.* 7, *c.* 7), *s.* 7, *sub-s.* 2.

By s. 66 of the Customs Consolidation Act, 1876: "if any goods be taken or delivered out of any ship or out of any warehouse, not having been duly entered, the same shall be forfeited: Provided always, that no entry shall be required in respect of the baggage of passengers which may be examined, landed, and delivered under such regulations as the Commissioners of Customs may direct. . . . ."

By s. 7, sub-s. 2, of the Finance Act, 1901: "As respects the first levying or repealing of any duty of customs . . . . the time at which the importation of any goods shall be deemed to have had effect shall be the time at which the entry of the goods under the Customs Act is delivered."

On June 30, 1925, the Finance Act, 1925, was passed, imposing as from July 1, 1925, Customs duties on all imported cinematograph films.

The suppliant, who was a producer of cinematograph films, was informed towards the end of June, 1925, that such duties would probably be imposed. He went to Berlin, where he had six films, which he packed in cardboard boxes. He took them to the railway station on June 29, 1925, and registered them through to Victoria Station, London. The suppliant and his wife travelled by the same trains and boat in which the films were conveyed. At Folkestone, in answer to the inquiry by the Customs officer whether he had anything to declare, the suppliant produced the registration receipt and pointed out the boxes of films. No comment was made there by the Customs officer. At Victoria Station, which was reached at 9.30 P.M. on June 30, after the latest hour for entry of goods, the films were detained on the ground that they were liable to forfeiture for non-entry. Later the Customs authorities offered to waive the forfeiture on payment of the duty under the new Act to which they were liable if entered after June 30. The suppliant was unable or unwilling to pay the duty. After correspondence and negotiations extending over several years, the suppliant claimed by petition of right the return of the films and damages for their detention :—

Held, that the films were not "baggage of passengers" within the meaning of s. 66 of the Customs Consolidation Act, 1876. They ought therefore to have been entered, and the petition of right failed. The phrase "baggage of passengers" should be given the same meaning as had been placed by the Courts on "ordinary luggage" or "personal luggage," i.e., articles intended for the traveller's personal use or convenience as distinct from merchandise carried for purposes of business.

(1) Affirmed in C. A. [1933] W. N. 53.

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Phelps v. *London & North Western Ry.* (1865) 19 C. B. (N. S.) 321; *Hudston* v. *Midland Ry.* (1869) L. R. 4 Q. B. 366; *Macrow* v. *Great Western Ry.* (1871) L. R. 6 Q. B. 612 applied.

Semble, a petition of right will lie for detinue of chattels by servants of the Crown.

PETITION OF RIGHT.

The suppliant, Martin Buckland, was a producer of operatic films. In the early part of 1925 he produced in Berlin films of six operas which were intended for production in Great Britain. In June, 1925, the suppliant was informed, correctly, as it proved, that a Customs duty might be imposed by Great Britain on imported films. On June 30, 1925, the Finance Act, 1925 (15 & 16 Geo. 5, c. 36), was passed. By s. 3 of that Act certain duties of a substantial character were to be charged on and from July 1, 1925, on all imported cinematograph films, whether blank, positive or negative films. When the suppliant received information of the probable imposition of duty he at once returned to Berlin, arriving there on June 29. He there packed his films, amounting to about 23,000 feet, in six separate parcels, each in a cardboard box about one foot square. On the evening of June 29 the suppliant and his wife took the six parcels to the railway station at Berlin, and there registered them through to Victoria Station, London. The suppliant and his wife travelled in the train in the luggage van of which the parcels were conveyed as far as Flushing, and in the ship from Flushing to Folkestone, the parcels being then carried on the deck. At Folkestone the Customs officials came on board, and in reply to a question whether he had anything to declare, the suppliant replied, "I have six parcels of films here," and produced the registration receipt and pointed to the parcels. The Customs officials made no observation. The suppliant remained at Folkestone while his wife travelled to Victoria, the parcels being conveyed, as before, in the registered luggage van. At Victoria, where the train arrived about 9.30 P.M., long after the ordinary hours for the entry of merchandise, the parcels were put out in the ordinary way for examination. The suppliant's wife told the Customs officer that they contained films. The Customs officer formed the view that they were not "baggage of passengers" within the meaning of s. 66 of the Customs Consolidation Act, 1876 (1), and informed the suppliant's wife that they would be detained pending the decision of his superiors as to what should be done or demanded on the ground that they were merchandise and required entry in due form.

On July 1 the suppliant came to London and saw the Customs officials, who maintained (1.) that the goods were lawfully detained; (2.) that technically they were liable to forfeiture on the ground that they had not been duly entered; (3.) that they were liable to duty, under the Act which came into force that day, amounting to 567*l.* The suppliant claimed that he was entitled to have the parcels delivered to him without formalities of entry and without payment of duty. The Customs authorities were willing to release the films on payment of the 567*l.* as a deposit, and to waive any question of fine or forfeiture. The suppliant was either unable or unwilling to pay that sum, and the six parcels (which the suppliant asserted to have been worth 35,000*l.* in 1925) remained in the custody of the Crown while interviews and correspondence took place intermittently between the parties over a period of some years. Finally, in December, 1931, the suppliant launched his petition of right, claiming the return of the films or their value, and 32,000*l.* damages for their detention, the value in 1931 being alleged to have dropped to 3000*l.*

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(1) Sect. 64 of the Customs Consolidation Act, 1876, provides in substance for the form and particulars required for the due entry of goods which are free of duty.

Sect. 66: "If any goods or other things shall be found concealed in any way or packed in any package or parcel to deceive the officers, such package or parcel, and all the contents thereof, shall be forfeited; and if any goods be taken or delivered out of any ship or out of any warehouse, not having been duly entered, the same shall be forfeited: Provided always, that no entry shall be required in respect of the baggage of passengers, which may be examined, landed, and delivered under such regulations as the Commissioners of Customs may direct, but if any prohibited or uncustomed goods shall be found concealed therein, either before or after landing, the same shall be forfeited, together with everything packed therewith."

Sect. 7, sub-s. 2, of the Finance Act, 1901 (1 Edw. 7, c. 7): "As respects the first levying or repealing of any duty of customs . . . . the time at which the importation of any goods shall be deemed to have had effect shall be the time at which the entry of the goods under the Customs Act is delivered instead of the time mentioned in section forty of the Customs Consolidation Act, 1876."

In answer, the Crown demurred on the ground that no petition of right complaining of a wrongful or tortious act by the servants of the Crown could be maintained. The detention of the films was admitted, but it was said that no entry thereof having been made before July 1, 1925, they became liable to duty amounting to 567*l.* The Customs authorities were willing to deliver up the films on payment of the duty.

Claude Grundy for the suppliant.

Sir Boyd Merriman S.-G. and *Bowstead* for the Crown.

Cur. adv. vult.

1932. Nov. 8. McCARDIE J. gave the following judgment :—

This is in form a petition of right by Mr. Martin Buckland against the Crown, but in substance it becomes an action by Mr. Buckland as plaintiff against His Majesty's Commissioners of Customs and Excise as defendants. In this judgment, therefore, I will call him the plaintiff and the Commissioners of Customs and Excise the defendants.

The plaintiff's claim is based on detinue. He asks for the return to him of certain films which he asserts to be worth 3000*l.* He also asks for 32,000*l.* damages for detention. The petition is carefully framed and worded. It was presented in December, 1931, but the facts of the case go back to 1925. The points raised are novel and in some ways may be important. The circumstances which give rise to the claim can be stated with reasonable conciseness. In the early part of 1925 the plaintiff was actively engaged in the film industry. He formed the opinion that films of operas could be successfully produced in which the scenery and subordinate parts could be prepared in the ordinary cinematographic manner, but the principal parts would be given in person by living and well-known artists. So the plaintiff went to Berlin. There he caused to be produced, at substantial cost, the scenery and subordinate parts for six operas, and those operas were as follows: (1.) "The Merry Wives of Windsor"; (2.) "Martha"; (3.) "Lohengrin"; (4.) "Cavalleria Rusticana"; (5.) "Der Freischütz"; (6.) "Waffenschmied." The idea of the plaintiff was novel. If his plan succeeded he might make much profit; if it failed the loss would be heavy. The films were intended for production in Great Britain. In June, 1925, the plaintiff, then in England, received information that a Customs duty might be imposed on imported films. He was correct in his information. On June 30, 1925, the Finance Act of that year was passed (15 & 16 Geo. 5, c. 36). It provided by s. 3 that on and from July 1, 1925, certain duties of a substantial character should be charged, levied and paid on imported cinematograph films. The duties covered films whether they were blank films, positive films or negative films. This was the legislation which gave rise to the present petition. Now when the plaintiff heard that the above Customs duty might be imposed he went to Berlin, where his film operas were stored. He reached Berlin on June 29. He got his films. He packed them into six separate parcels. Each parcel was in a cardboard box of corrugated paper. Each parcel was about one foot square. There were about 23,000 feet of films. The plaintiff's wife was with him in Berlin. On the evening of June 29 they went to the railway station at Berlin. They took with them the six parcels. At the railway station they registered the parcels through from Berlin to Victoria Station, London. The registration receipt has been produced to me. In substance the receipt states that six packages have been registered through to Victoria Station, London. On the back of the receipt are printed several sentences, of which these are two which are material. One is: "The forwarding of luggage will be effected according to" so-and-so; the second is: "Baggage will only be delivered to the bearer of this receipt." The train started from Berlin with the plaintiff and his wife in an ordinary compartment and the six parcels in the registered luggage van. The train reached Flushing. There the parcels were taken from the van and put on board the ship, on the deck. The ship reached Folkestone. The Customs officials came on board. They asked the plaintiff whether he had anything to declare, and he replied: "I have six parcels of films here," and he produced the receipt and pointed to the six parcels on deck. The Customs officials made no observation. The time was now about 6 P.M. on June 30. At Folkestone the parcels were taken by trolley from the quay to the registered luggage van of the train for Victoria. The plaintiff's wife travelled in the train to Victoria. The plaintiff himself remained for private reasons at Folkestone. The train reached Victoria about 9.30 on the evening of June 30. At Victoria the parcels were put out in the ordinary way for examination. The Customs official concerned was Mr. Kay. His testimony differs from that of the plaintiff's wife. I accept the evidence of Mr. Kay. It is admitted that the plaintiff's wife told him that the six parcels contained films. Mr. Kay, I am satisfied, made no mention of a fine. But he formed the view that the parcels were not ordinary personal luggage or baggage at all. He told the plaintiff's wife that the parcels were merchandise, and he informed her that the parcels would be placed in detention pending the decision of his superiors as to what should be done or demanded. He therefore put the parcels in detention on the ground that they were merchandise and required entry in due form under the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36). The plaintiff's wife wrote to her husband to tell him what had occurred at Victoria Station. The next morning, July 1, 1925, the plaintiff came to London and saw the Customs officials. In substance, they said, firstly, that the goods were lawfully detained; secondly, that technically they were exposed to forfeiture on the ground that they had not been duly entered; and, thirdly, that they were liable to duty under s. 3 of the Finance Act, 1925—already referred to by me—that Act coming into force for this purpose on and after July 1, 1925. The plaintiff disputed these assertions, and claimed that he was entitled to have the six parcels (which he asserted to be worth well over 30,000*l.*) delivered to him forthwith without any formalities of entry under the Customs Act and without any payment of duty. Further interviews took place. Each party maintained his and their respective positions. The Customs claimed that the duty payable on the films was about 567*l.*; the plaintiff saw his solicitors and a prolonged correspondence followed, which I need not deal with in detail. The Customs were willing to accept the 567*l.* as a deposit until the dispute was settled. The plaintiff would not or could not find the 567*l.*, although the Customs would have released the films to him on receipt of that sum. They also made other suggestions to ease the position. They waived (inter alia) any question of a fine and any question of a forfeiture. After the correspondence of 1925 matters remained in abeyance for about two and a half years. In 1928 another outbreak of correspondence took place without result. Then came another interval of nearly three years in which nothing was said or done on either side. Then came a revival of interest by the plaintiff, and finally this petition of right was launched in December, 1931. The six parcels are still in the custody of the defendants. The question as to their condition, their deterioration or otherwise is a matter of dispute.

Now, in order to appreciate the points of law at issue, it is necessary to refer to the Customs Consolidation Act of 1876. It is a statute of nearly 300 sections; I will mention some of them. Sect. 7 provides that the Commissioners of the Treasury may fix the hours of attendance of officers of Customs and of other persons in the Customs service at their proper offices and places of employment. It is admitted that on June 30, 1925, the Customs day ended at 5 o'clock P.M. Sect. 30 provides for a deposit of duty by the importer in the event of a dispute as to the proper rate payable. Sect. 39 contains a general provision as to importation and prohibition. Sect. 40 was important. It provided as follows, in substance:

"If upon the first levying or repealing of any duty, or the first permitting or prohibiting any importation, or at any other time, or for any of the purposes of the Customs Acts, it shall become necessary to determine the precise time at which an importation of any goods shall be deemed to have had effect, such time shall be deemed to be the time at which the ship importing such goods actually came within the limits of the port at which such ship shall in due course be reported and such goods be discharged." I said that s. 40 was important. It was important because it has to be contrasted with the new statutory provision which has replaced it. The Finance Act of 1901 (1 Edw. 7, c. 7) contains that provision. By s. 7, sub-s. 2, thereof it is provided: "As respects the first levying or repealing of any duty of customs (including any duty imposed by this Act), the time at which the importation of any goods shall be deemed to have had effect shall be the time at which the entry of the goods under the Customs Act is delivered instead of the time mentioned in section forty of the Customs Consolidation Act, 1876." The bearing of this provision on the points at issue in this petition will be apparent. Sect. 48 of the Act of 1876 contains provision as to the time and place of landing goods imported in British ships, and it also contains certain provisions as to forfeiture. Sects. 50 and 51 relate to the duty of the master of a ship to report cargo. Sects. 55 to 63 are a bundle of sections relating to the forms and particulars required for the due entry of dutiable goods for home use. Sect. 64 provides (in substance) for the form and particulars required for the due entry of goods which are free of duty. The form is indicated as being Form 5 in Schedule B to the Act. I may here refer to s. 72 of the Act, which provides that: "Every importer, agent, or other person entering any goods who shall fail to comply with the foregoing regulations, so far as they are respectively applicable to the goods entered by him, shall forfeit a sum not exceeding twenty pounds, and such goods shall be liable to forfeiture."

I now come to the section which relates most directly to the main issue before me. Sect. 66 of the Act is as follows: "If any goods or other things shall be found concealed in any way or packed in any package or parcel to deceive the officers, such package or parcel, and all the contents thereof, shall be forfeited; and if any goods be taken or delivered out of any ship or out of any warehouse, not having been duly entered, the same shall be forfeited: Provided always, that no entry shall be required in respect of the baggage of passengers, which may be examined, landed, and delivered under such regulations as the Commissioners of Customs may direct, but if any prohibited or uncustomed goods shall be found concealed therein, either before or after landing, the same shall be forfeited, together with everything packed therewith." It was upon this section that much argument arose before me. In substance, the Crown contended: (*a*) that the six parcels in question were not "baggage of passengers"; (*b*) that therefore such parcels required entry under s. 64; (*c*) that no such entry was made or attempted by the plaintiff on June 30; (*d*) that s. 7, sub-s. 2, of the Finance Act, 1901, applied to the facts of the case; and (*e*) that it therefore followed that the six parcels must be deemed to have been imported into Great Britain on or after July 1, 1925, so as to be subject to the duties imposed by s. 3 of the Finance Act, 1925. The leading point of the case, therefore, is whether or not the six parcels were "baggage of passengers" within s. 66 of the Customs Consolidation Act, 1876. There is no direct decision on the point. The Customs Act itself contains no definition of the words "baggage of passengers." It is common ground that in June and July of 1925 there were no regulations of the Commissioners with respect to the meaning of those words. The prospective and purely departmental directions of the Commissioners, dated June 15, 1925, and to come into force on July 1, 1925, do not appear to assist on the question before me. They were made in anticipation of the passing of s. 3 of the Finance Act, 1925 I need not refer to them in detail.

Now, are the defendants right in their contention that these six parcels were not the "baggage of passengers"? The plaintiff's counsel, Mr. Grundy, vigorously and ably argued that in fact the parcels fell within the words "baggage of passengers" under the circumstances disclosed in the facts stated in the earlier part of this judgment, and that, therefore, no entry was required, no duty was payable, and that the plaintiff should have had his property delivered to him promptly at Victoria on the evening of June 30, 1925. The Customs Consolidation Act of 1876 is loosely worded. I think that the general scheme of that Act is that all goods imported into this country shall prima facie be entered, whether the goods be dutiable or not. Such entry may be needed for the purpose of statistical information, even if the goods be duty free. The relaxation of the prima facie obligation shown by s. 66 of the Act of 1876 followed the relaxation which had first been allowed, as I gather from the Solicitor-General, by the Customs Consolidation Act, 1853 (16 & 17 Vict. c. 107), s. 69, which was replaced by the Act of 1876. The words "baggage of passengers" seem to present a mixed question of law and fact. The dictionary meaning (see, for example, the Imperial Dictionary) is given as "the clothing or other belongings which a traveller carried with him on a journey; now usually called luggage in this country, though baggage is still the common word in America." In Stroud's Judicial Dictionary (1) it is said: "Baggage means such articles of necessity or personal convenience as are usually carried by passengers for their personal use (*Bomar* v. *Maxwell* (2)), and is, semble, synonymous with personal luggage, and, in the United States, is the word generally used for what in England is more frequently called personal luggage." He then cites the well known passage from Story on Bailments, s. 499, as follows: "By 'luggage' we are to understand such articles of necessity or personal convenience as are usually carried by passengers for their personal use; and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use but for other purposes, such as sale and the like." Such is the extract from Stroud. It may well be said that if these six parcels are to be deemed the baggage of passengers, then why not also a dozen cases of cutlery or a dozen Turkey carpets or a score of garden seats? What an opening for evasion and abuse would thus be given. But it is important to secure, as far as possible, some uniformity of ruling, having regard to the existing confusion of English case law on many subjects. I must, therefore, turn to the decisions given in this country under the various Railway Acts and Regulations with respect to such phrases as "ordinary luggage," "passenger's luggage" and "personal luggage." I myself can see no substantial distinction between such words and the words "baggage of passengers" as used in the Customs Consolidation Act, 1876. I incline to the view that, having regard to the purposes and the detailed requirements and provisions of the Customs Act, it was intended, and rightly intended, to emphasize in s. 66 the distinction between articles of merchandise and articles in the nature of personal luggage.

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(1) Ed. 2, tit. Baggage, p. 157.

(2) (1849) 9 Humphreys, 620, U.S.A.; 51 American Decisions, 682.

Now how do the decisions stand on the meaning of the words "ordinary luggage," "passenger's luggage," and "personal luggage" under the English Railways Acts and Regulations? The phrase "ordinary luggage" was dealt with in *Phelps* v. *London and North Western Ry. Co.* (1) There it was held that title deeds which a solicitor was carrying with him in the interests and for the purposes of his client were not "ordinary luggage" within the meaning of the Act. In that case Erle C.J. said: "It is agreed on all hands that it is impossible to draw any very well-defined line as to what is and what is not necessary or ordinary luggage for a traveller; that which one traveller would consider indispensable, would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind must be taken to be in the mind of the carrier when he receives a passenger for conveyance." In *Hudston* v. *Midland Ry. Co.* (2) Lush J., as he was in those days, defined "ordinary luggage" as describing "a class of articles which are ordinarily or usually carried by travellers as their luggage,"

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(1) 19 C. B. (N. S.) 321, 330. (2) L. R. 4 Q. B. 366, 370.

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but extending to "something more than that which he requires for his own personal use and convenience." In that case a child's spring horse, weighing 78 lbs., and measuring 44 inches in length, was excluded, because of its unusual size and shape; apparently it would seem from that decision that a smaller toy might well have been included in the phrase "ordinary luggage." It was stated in *Hudston's* case (1) by the Court that certainly the words "ordinary luggage" did not extend to articles of merchandise. In *Macrow* v. *Great Western Ry. Co.* (2), which was quoted before me, the words at issue were "ordinary passenger's luggage." Cockburn C.J. there made some observations which were often referred to in these cases. He said there: "We hold the true rule to be that whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities, or to the ultimate purpose, of the journey, must be considered as personal luggage. This would include, not only all articles of apparel, whether for use or ornament, ... but also the gun-case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveller, and the taking of which has arisen from the fact of his journeying." In the same judgment the rule of exclusion is stated to be as follows: "What is carried for the purposes of business, such as merchandise or the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description of ordinary luggage unless accepted as such by the carrier." So in that case a trunk containing six pairs of sheets, six pairs of blankets and six quilts was held to be outside the range of ordinary luggage, though a pair of sheets or the like, for the passenger's own use on a journey, might have been included. Applying that principle, because there seems to be a principle asserted in that case, it would seem clearly to exclude the films here in question. Let me pause for one moment to say this. I do not think there can be any question of estoppel here at all. The German State Railway in Berlin can accept what it pleases as registered luggage and put it into the registered luggage van, but nothing that could be done by a State Railway or a private railway in this great German area could to my mind possibly affect in any way the rights or the duties of the Customs official acting under the authority of His Majesty and applying the provisions of the Customs Consolidation Act, 1876. I cannot see any ground for estoppel at all in the present case. Therefore the dividing line seems to be between articles of personal and immediate use and articles of merchandise or of ulterior use. Here the films cannot be said to be in any way of personal use and convenience to the plaintiff. He had got them with him either for the purpose of immediate sale or for subsequent disposal. They were in fact articles of high value, according to him, carried by him for the purpose of dealing with them commercially. Pausing for a moment, I may say that the observations of Cockburn C.J. in *Macrow's* case (1) as to the exclusion of merchandise followed and adopted the view expressed by Parke B. in *Great Northern Ry. Co.* v. *Shepherd.* (2) The difficulties under these Railway Acts certainly are not such as can be overlooked. It is undoubtedly difficult to draw a distinction between the permissible and the unpermissible; because whilst, according to *Macrow's* case (1), the artist's easel is to be admitted as " personal luggage," yet it has been held that a violoncello carried for professional purposes is not to be admitted : see *Great Western Ry. Co.* v. *Evans.* (3) I do not propose to criticize these decisions in detail. They offer many points of criticism. I confess at once I cannot reconcile the two sets of observations by the Court. Apparently the decision in the violoncello case would qualify *Macrow's* case (1), and would seem to draw a distinction between the artist who only amuses himself and the artist who hopes to sell his work. In fact the pencil sketches of an artist have been held not to be passenger's

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(1) L. R. 4 Q. B. 366, 370.

(2) L. R. 6 Q. B. 612, 622.

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(1) L. R. 6 Q. B. 612.

(2) (1852) 8 Ex. 30, 39.

(3) (1921) 38 Times L. R. 166.

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luggage: see *Mytton* v. *Midland Ry. Co.* (1) "Personal luggage," it has been held, as I pointed out, does not include documents which a solicitor is taking with him to Court for use in connection with the litigation of his client: *Phelps* v. *London and North Western Ry. Co.* (2) It has been held that "personal luggage" does not include a hamper the greater part of the contents of which are the professional costumes and property of a comedian: see *Gilbey* v. *Great Northern Ry. Co.* (3) Again I point out the difficulty of reconciling a decision such as that with some of the observations of Cockburn C.J. in *Macrow's* case. (4)

It has been held in Canada that a sewing machine is not passengers' luggage: see *Bruty* v. *Grand Trunk Ry. Co.* (5) It has even been held in Great Britain that an invalid chair is excluded: see *Cusack* v. *London and North Western Ry. Co.* (6) It has also been held that a bicycle is not luggage—why, one cannot see; so it has been held, and in the case where the matter was referred to (*Britten* v. *Great Northern Ry. Co.* (7)), a somewhat full definition was suggested by Channell J. I need not read the words he there delivered. I will only say that if one reads his observations one finds several inconsistencies between what he said and what was said by Cockburn C.J. in *Macrow's* case. (4) For example, he seemed to think that a gun, with its case, might be carried as ordinary luggage, but that a gun apart from its case apparently would not be personal luggage. I can only say I abstain from criticism upon the various observations appearing in these different decisions. Still stranger to my thinking —I say it with all respect—is the decision in *Jenkyns* v. *Southampton, etc., Steam Packet Co.* (8), where it has been held that an officer's revolver and binoculars are his luggage. So be it. How they can be his luggage and how the professional costumes of a comedian can not be luggage is a matter which I do not propose to deal with now. I have cited one or two

(1) (1859) 28 L. J. (Ex.) 385.
(2) 19 C. B. (N. S.) 321.
(3) (1920) 36 Times L. R. 562.
(4) L. R. 6 Q. B. 612.
(5) (1871) 32 Upper Canada Rep. (Q. B.) 66.
(6) (1891) 7 Times L. R. 452.
(7) [1899] 1 Q. B. 243.
(8) [1919] 2 K. B. 135.

cases that were not mentioned to me by counsel in their learned arguments, and I should like to add it has been much debated in several cases whether a typewriter carried by a passenger is luggage, whether ordinary or personal. In Ireland the question whether a sewing machine is personal luggage has been held to depend on whether it is carried by a lady for personal use or by a professional seamstress: see *Shannon* v. *Midland Great Western Ry. Co.* (1) There is much confusion in the English case law, and I can only add that I hope the day is approaching when the confusion will be recognized and a clearer formulation will take place, and when chaos in many parts of the great area of English case law will be replaced by correct and well ordered formulation.

Now I have referred to those decisions which counsel were good enough to discuss very fully. Viewing them as a whole, and bearing in mind the facts and circumstances of the present case, I must hold that the six parcels of films were not " baggage of passengers " within the fair meaning of s. 66 of the Customs Consolidation Act, 1876. It therefore follows that the Crown is right in its contentions, and that the Commissioners of Customs were entitled to detain the parcels until the plaintiff had duly entered them and had paid the appropriate duty upon them. I must rule that the petition of right fails.

It is not, therefore, strictly necessary to deal with the further points so fully and ably argued before me, but I should like to express my own view that a petition of right lies against the Crown in respect of goods wrongfully detained by its servants in such circumstances as the present. Into the nature of an action for detinue I need not now go. It will suffice to refer to Sir Frederick Pollock's admirable book on the Law of Torts, 13th ed., pp. 12 to 15, and Bullen and Leake on Pleadings (1868), 3rd ed., pp. 311 et seq. That such petition for detinue will lie is scarcely denied by the Crown, and I see that there is no demurrer on the point. I may also refer to the interesting case of *Conrad* (2); to *Tobin* v. *The Queen* (3)

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(1) (1898) 33 Ir. L. T. Rep. 32.

(2) (1275) 4 Ed. I. (at p. 5 of the *Memoranda in Scaccario* in the folio edition, 1678, of the Year Book).

(3) (1864) 16 C. B. (N. S.) 310.

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McCardie J.

and the observations therein contained; and also to *Feather* v. *The Queen.* (1) It would indeed be a grave state of affairs if a subject were destitute of remedy where the servants of the Crown wrongfully detained his goods. In view of my ruling on the main point, I will not discuss the distinction between value and damages in cases of detinue. The points are of importance. In view of the interest of the case, I will just refer to Arnold on Damages, 2nd ed., pp. 113 to 115, and also pp. 101 to 102; and to *Williams* v. *Archer* (2); and to *Williams* v. *Peel River Land and Mineral Co., Ld.* (3) If I had been called upon to assess the value of the six films here in question I should have had to embark on an interesting and difficult matter. Even assuming that the films had cost the plaintiff 30,000*l.* or more to make in 1925, yet there is his letter of August 10, 1925, in which he says that "in any case the pecuniary value of the films does not come to anything like 500*l.*" It must also be remembered that the plaintiff could in 1925 have obtained possession of his films by depositing with the Customs the sum of 567*l.* If his films were of great value it would seem strange that he or his business associates could not find that sum. It is also necessary to remember the words of Scrutton L.J. in *The Edison*, where he says (4): "I am not aware that the poverty of the injured person has ever been allowed to increase damages for loss of property." I may say that those observations of Scrutton L.J. are in accordance with two definite rulings on the point in cases in which I was engaged at the Bar in nisi prius, and also in accordance with observations made by the Court of Appeal in cases in which I was engaged when I was arguing matters in former and, perhaps, in happier days. Such is all I need say, except to thank counsel on both sides for their lucid and learned arguments.

The petition of right fails.

Petition dismissed.

Solicitors for the suppliant: *Gordon Gardiner, Carpenter & Co.*
Solicitor for the Crown: *The Solicitor of Customs and Excise.*

(1) (1865) 6 B. & S. 257.
(2) (1847) 5 C. B. 318.
(3) (1886) 55 L. T. 689.
(4) [1932] P. 52, 66.

J. W. H.

VANBERGEN *v.* ST. EDMUNDS PROPERTIES, LIMITED.

1932
Nov. 3, 4, 23, 25.

Contract—Consideration—Debt—Agreement to obtain Amount of Debt and pay it, through another Bank, into Banking Account of Creditors' Solicitors —Obligation of Debtor—Nudum pactum—Breach of Contract—Service of Bankruptcy Notice on Trader—Measure of Damages.

The plaintiff, a trader, being indebted to the defendants, an agreement was made between him and the defendants' solicitors that, if he would pay the amount of the debt into a bank in the country for the credit of the defendants' solicitors in London, that payment would satisfy all sums which he owed to the defendants, and a bankruptcy notice which they had issued in respect of part of the debt would not be served on him. The plaintiff carried out his part of the agreement, but, in breach thereof, the defendants, by a clerk of their solicitors, served him with the bankruptcy notice :—

Held, that, as the plaintiff, by the agreement, was not to pay his debt to his creditors, but was to pay the money to the account of the defendants' solicitors, which he was not under any obligation to do, there was sufficient consideration to prevent the agreement being nudum pactum and the plaintiff was entitled to maintain an action for breach of the agreement.

Foakes v. *Beer* (1884) 9 App. Cas. 605 distinguished.

The service of the bankruptcy notice having been effected within the knowledge of two business associates of the plaintiff:—

Held, that the defendants were liable to the plaintiff in substantial, though reasonable and temperate, damages.

Rolin v. *Steward* (1854) 14 C. B. 595 applied.

FURTHER consideration of action tried by Macnaghten J. with a special jury.

In July, 1932, the plaintiff, a business man trading in London, was indebted to the defendants in the sum of 208*l*. odd for costs under judgments and an order which had been obtained by the defendants against him in April and May, 1932.

By his statement of claim the plaintiff alleged that on July 6, 1932, the defendants, by a Mr. Kennard, their solicitor, of the firm of Messrs. Stanley Evans & Co., verbally agreed with him that, if he would, on July 7, 1932, pay the 208*l*. in cash into a bank at Eastbourne for the credit of Messrs. Stanley Evans & Co. at the Law Courts branch of the Bank of England, that payment would satisfy all sums which he owed them, and a bankruptcy notice which they had issued on

June 4, 1932, in respect of 140*l.*, part of the debt, would not be served on him. On July 7 the plaintiff paid the 208*l.* to the Midland Bank, Eastbourne, with instructions to remit it to the credit of Messrs. Stanley Evans & Co. with the Law Courts agency of the Bank of England. The plaintiff alleged that, on July 7, he advised Messrs. Stanley Evans & Co. of the payment, and that, on July 8, he informed the defendants' clerk thereof, but that, in breach of the agreement, the defendants, by a clerk of their solicitors, served him with the bankruptcy notice within the knowledge of two business associates of his. He claimed damages for the alleged breach of contract.

The defendants denied that the alleged agreement was ever made, pleaded that, if it were made, there was no consideration for the making of it, and denied that the plaintiff had suffered damage.

The jury found that the alleged agreement was made, and returned a verdict for the plaintiff, assessing the damages at 500*l.*

G. O. Slade for the defendants. The plaintiff is not entitled to maintain the action, there having been no consideration for the alleged contract. The only consideration suggested is the payment by the plaintiff to the representatives of the defendants of the money which he was legally bound to pay to the defendants, and the performance of an existing obligation cannot be consideration to support a new promise: Leake on Contracts, 8th ed., p. 464. There must be some new consideration to support a new agreement: *Foakes* v. *Beer.* (1) [He also referred to *Hookham* v. *Mayle.* (2)] As regards damages, the plaintiff, even if he can maintain the action, is entitled to only nominal damages. In the absence of a special contract a defendant cannot be made liable for damage arising in special circumstances: Mayne on Damages, 10th ed., pp. 23, 28.

Comyns Carr K.C. and *B. L. A. O'Malley* for the plaintiff. The plaintiff is entitled to maintain the action. There was

(1) 9 App. Cas. 605.

(2) (1906) 22 Times L. R. 241.

good consideration for the contract sued on in that there were things therein which were a new benefit to the defendants: per Cotton L.J. in *Bidder* v. *Bridges*. (1) If anything is found in a contract such as this, superadded to the debt, which can be of legal value to the creditor, that is sufficient consideration. Here the plaintiff took active steps to get the money, going to Eastbourne and paying the money into a local bank with instructions to transfer it to the account of the defendants' solicitors in London. Those were things which he was not under any legal obligation to do and which were to his detriment and the defendants' benefit.

The plaintiff is entitled to substantial damages. The only object of the agreement was to preserve his credit. The principle to be applied is that exemplified by cases where banks have been held to be liable to customers for negligence or breach of duty: e.g., *Rolin* v. *Steward* (2); *Wilson* v. *United Counties Bank, Ld.* (3) Those cases show that the plaintiff can recover damages for injury to his reputation apart from actual damage.

G. O. Slade replied.

Cur. adv. vult.

Nov. 25. MACNAGHTEN J. delivered the following judgment: The questions which arise in this case are whether the action is maintainable, and, if it is maintainable, whether the plaintiff can recover more than nominal damages.

In support of the view that the action is not maintainable Mr. Slade relied on *Foakes* v. *Beer* (4), but that case seems to me to have no application at all to the present matter. There it was held that an agreement between judgment debtor and creditor that, in consideration of the debtor paying down part of the judgment debt and the costs, and paying the residue by instalments, the creditor would not take any proceedings on the judgment, was nudum pactum, being without consideration, and that it did not prevent the creditor, after payment of the whole debt and costs,

(1) (1887) 37 Ch. D. 406, 417.
(2) 14 C. B. 595.
(3) [1920] A. C. 102.
(4) 9 App. Cas. 605.

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Macnaghten J.

from proceeding to enforce payment of the interest upon the judgment. In the present case the jury, by their verdict, have found that on July 6 Mr. Kennard made an offer that if, on the following day, the plaintiff obtained the money and paid it into a bank at Eastbourne with instructions to remit it to the account of Stanley Evans & Co. at the Law Courts branch of the Bank of England, he would not serve the bankruptcy notice. That offer became a contract when the plaintiff accepted it. The plaintiff, by going to Eastbourne, obtaining the money, and remitting it in the manner suggested, made it a binding contract on the part of Mr. Kennard that he would not serve the bankruptcy notice. The verdict of the jury takes the case outside *Foakes* v. *Beer* (1), because, according to the terms proposed, the plaintiff was not to pay his debt to his creditors, but was to secure the payment of the money to the account of Stanley Evans & Co. at the Law Courts branch of the Bank of England. He was under no obligation to do that, and there was, therefore, sufficient consideration to prevent the alleged contract being nudum pactum. The plaintiff is therefore entitled to recover on the contract as found by the jury.

With regard to damages, I do not think that the cases with regard to contracts for the sale of goods have any bearing on a case such as this. The plaintiff is a trader and the service of a bankruptcy notice on a trader, if effected in any such circumstances of publicity as the jury must have found in this case, is an act which would very likely affect the credit of the trader. In my view, those cases are apposite in which it has been held that, if a banker, with funds in his hands belonging to a customer, dishonours a cheque drawn by the customer, he is liable in substantial damages to the customer for breach of contract. *Rolin* v. *Steward* (2) is one of a number of cases to that effect. The damages, as Lord Campbell directed the jury in that case (3), must not be excessive. They must be reasonable

(1) 9 App. Cas. 605.

(2) 14 C. B. 595.

(3) 14 C. B. 595, 599.

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and temperate. Having regard to what took place at the trial, I do not think that the damages awarded by the jury can be considered excessive. The plaintiff is therefore entitled to judgment for 500*l.* and costs.

Judgment for the plaintiff.

Solicitor for plaintiff: *G. E. Hodgkinson.*
Solicitors for defendants: *Stanley Evans & Co.*

G. F. L. B.

THOMAS MERTHYR COLLIERY COMPANY, LIMITED v. DAVIS.

K. B. D.
1932
May 24, 25.
C. A.
July 22, 25.

Revenue—Income Tax—Trade Profits—Deductions—Colliery Company—Subscription to Coalowners' Association—Consideration of Purposes to which Subscription applied—Contributions for Indemnity against Loss by Strikes and to Mining Association not deductible—Contribution to Conciliation Board deductible—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D—Rules applicable to Cases I. and II., r.* 3.

A colliery company was a member of an association of colliery companies formed for the purpose of assisting the members in working their collieries and of indemnifying them in the event of deficiency or stoppage of output due to strikes. The company in making a return of the profits of its trade for income tax purposes claimed to deduct subscriptions paid by it to the association as having been wholly and exclusively expended for the purposes of its trade:—

Held, by Finlay J. (following *Lochgelly Iron and Coal Co.* v. *Crawford,* 1913 S. C. 810; 6 Tax Cas. 267), that the company was entitled to deduct so much of the subscriptions as had been applied towards the expenses of the Conciliation Board.

Held, by the Court of Appeal (affirming Finlay J.'s decision on these points): (1.) that the company was not entitled to deduct so much of the subscriptions as had been applied by the association in indemnifying the company against loss by strikes: *Rhymney Iron Co.* v. *Fowler* [1896] 2 Q. B. 79; 3 Tax Cas. 476 approved and followed, and *Thomas* v. *Richard Evans & Co.* [1927] 1 K. B. 33 distinguished on this point; (2.) that the company was not entitled to deduct so much of the subscriptions as had been applied in paying contributions to the Mining Association of Great Britain: *Lochgelly Iron and Coal Co.* v. *Crawford,* 1913 S. C. 810; 6 Tax Cas. 267 approved and applied on this point.

C. A.
1932

Thomas Merthyr Colliery Co.
v.
Davis.

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts raising questions under the Income Tax Act, 1918, Sch. D. (1)

The Thomas Merthyr Colliery Company, Ld. (hereinafter called " the appellants "), carried on business as colliery proprietors in South Wales; and they were members of the South Wales Coal Owners' Association (hereinafter called " the Association ").

The Association was formed by an indenture dated July 1, 1890, for the purpose of rendering mutual assistance to the members in working their collieries in Monmouthshire and South Wales and of indemnifying the members in the event of deficiency or stoppage of output being caused by strikes, differences, etc.; and (inter alia) it provided (clause 18) that an owner wishing to join the Association should state the name of every colliery which he owned within the district of the Association, and for the purposes of the assurance he should state the output at each colliery during the year previous to the application; (clause 63, as amended by clause 63A), that the subscription payable by a member should be such amount per ton of assured output as might be authorized by the Association in general meeting: Provided that, (1.) where a member's total assured output at any annual revision exceeded the output upon which he had been charged subscriptions since March, 1927, he should pay such additiona subscription per ton as should be ascertained as therein directed; (clause 68) that in order to maintain a capital fund of at least 100,000*l.* the Association should from time to time resolve that contributions should be paid pro rata on their then approved output by members in addition to the subscriptions then payable by any of them; (clause 69) that the capital fund should consist of all moneys invested, cash at the bank, moneys due from members, and all other property; (clause 80) that in case of a strike on the part of the workmen, or any number of them, before or in consequence of the decision of the Association, and if the action of the member in reference to such strike was ratified by the Association, or in case of a restriction or cessation of output at a colliery in consequence of the member acting in accordance with some direction of the Association, certain subsequent provisions in regard to an indemnity should apply; (clause 81) that a member should be paid an indemnity on any deficiency of actual daily output and not in excess of the tonnage assured, to be calculated upon an average of the actual output per day during the three calendar months ending on the Saturday preceding the cessation or restriction of output, such daily average quantity to be ascertained by dividing the quantity raised in three months by 75; (clause 82) that the indemnity should be in accordance with a scale dependent on the average selling price per ton of coal (subsequently altered to a fixed sum per ton, that sum being from time to time varied); and (clause 88) that in case of a general strike or stoppage the funds of the Association should be made available for the assistance of the members as there provided.

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(1) *Income Tax Act*, 1918.
Schedule D.

1. Tax under this Schedule shall be charged in respect of—

(*a*) The annual profits or gains arising or accruing—

(i) to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere; and

(ii) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere; and

(iii) to any person, whether a British subject or not, although not resident in the United Kingdom, from any property whatever in the United Kingdom, or from any trade, profession, employment, or vocation exercised within the United Kingdom; and

(*b*) All interest of money, annuities, and other annual profits or gains not charged under Schedule A, B, C or E, and not specially exempted from tax;

in each case for every twenty shillings of the annual amount of the profits or gains.

2. Tax under this Schedule shall be charged under the following cases respectively; that is to say,—

Case I.—Tax in respect of any trade not contained in any other Schedule; . . . .

and subject to and in accordance with the rules applicable to the said Cases respectively.

Rules applicable to Schedule D.

. . . .

Rules applicable to Cases I. and II.

. . . .

3. In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—

(*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation:

. . . .

In 1926 a general strike took place in the coalfields, and the existing capital fund of the Association was exhausted. Since that year no capital fund had been maintained, and all the expenses of the Association, including the payment of indemnities to members, had been met from the general funds, which were obtained by a subscription of so much a ton on all members of the Association as and when required, the subscription being payable under clause 63 as amended by clause 63A of the indenture.

The appellants in making a return for income tax purposes of the profits and gains of their trade or business for the year ending April 5, 1929, claimed to deduct a sum of 312*l.* which in compliance with a resolution of the Association they had paid to it in the previous year as a subscription to the general funds of the Association; and in making a return for these purposes of the profits and gains of their trade or business for the year ending April 5, 1930, they claimed to deduct a sum of 59*l.* which under proviso (1.) to clause 63A of the indenture they had paid to the Association in the previous year as an additional subscription to its general funds.

In the computation of the assessable profits of the appellants the deduction of these sums was disallowed, and additional assessments were made upon the appellants in the sum of 312*l.* for the year ending April 5, 1929, and in the sum of 59*l.* for the year ending April 5, 1930.

On July 30, 1930, and February 9 and June 23, 1931, an appeal by the appellants against these additional assessments was heard by the above-mentioned Commissioners, the respondent to the appeal being Mr. C. Davis, H.M. inspector of taxes (hereinafter called "the respondent").

Mr. Finlay A. Gibson, the secretary of the Association, who was called as a witness before the Commissioners, and whose evidence they accepted, after describing the present activities of the Association and indicating how its activities had grown since 1896, when the case of *Rhymney Iron Co.* v. *Fowler* (1) was decided, owing to the altered conditions prevailing in and the effect of recent legislation upon the coal industry, further stated (inter alia) that about 110 collieries representing 93 per cent. of the output of the South Wales Coalfield were members of the Association; that in 1896 the main activity of the Association related to the insurance and indemnity of members; that in that year the only Act directly relating to the coal-mining industry was the Coal Mines Regulation Act, 1896; that since 1912 many Acts had been passed which affected that industry; that the interests of the mining industry were vitally affected by the recent legislation, and it was necessary for the coal owners to be represented by some such central organization as the Association, so that their interests could be guarded adequately and economically, and that they therefore became members of the Association; that since the War various bodies had been set up by Acts for the purpose of regulating wages and conditions of work in the collieries, and that the Association had appointed representatives to act on these bodies; that in 1924–1926 there was a prolonged hearing before the Railway Rates Tribunal for the purpose of fixing coal rates (inter alia) on the railways in South Wales, that before this tribunal it was not practicable for each colliery to be separately represented, and that the Association therefore represented the associated owners as against the Great Western Railway Company; that a similar inquiry was now in progress relating to dock charges; that a number of important committees had been set up by the Government upon which the associated owners were represented by the Association; that the Association maintained a statistical department which dealt with questions vitally affecting the amount of the profits of the coal mines, and had to be maintained in order to comply with official requests from Government departments for information; that the Association was a member of and as such paid a subscription to the Mining Association of Great Britain, and in some cases the interests of the coal owners were looked after by the latter Association instead of by the former; that an important branch of the latter Association was the propaganda department, which dealt with matters affecting the coal trade mainly by press articles and literature; and that the subscription of the Association to the Mining Association of Great Britain for the fifteen months ending March 31, 1928, was 26,608*l.* 15*s.*, and for the year ending March 31, 1929, was 9444*l.* 18*s.*

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(1) [1896] 2 Q. B. 79; 3 Tax Cas. 476.

Part of the money received by the Association from its members was expended in contributions to the Conciliation Board.

It was contended on behalf of the appellants: (*a*) that the sums of 312*l.* and 59*l.* paid by the appellants to the Association by way of subscriptions were proper deductions in arriving at the profits of the appellants; (*b*) that these sums were sums wholly and exclusively laid out or expended for the purposes of the trade of the appellants; (*c*) that these sums having been paid by the appellants to the Association for the purpose of enabling the appellants to earn profits in their trade it was not material to inquire how these sums were expended by the Association; and (*d*) that the sole test whether these sums were proper deductions was the nature of the service to be performed by the Association in return for these sums.

It was contended on behalf of the respondent (inter alia): (*a*) that these sums were not moneys wholly and exclusively laid out or expended for the purposes of the appellants' trade and were not proper deductions in arriving at their profits; (*b*) that these sums paid by the appellants to the Association should be allowed as a deduction in arriving at the profits of the appellants only so far as they had in fact been applied by the Association towards expenditure which would have been a proper trading expense had it been incurred by the appellants; (*c*) that these sums in so far as expended on indemnifying the appellants in the event of deficiency or stoppage of output were not proper deductions: see *Rhymney Iron Co.* v. *Fowler* (1); and (*d*) that these sums in so far as expended in contributions towards the Mining Association of Great Britain were not proper deductions: see *Lochgelly Iron and Coal Co.* v. *Crawford.* (2)

(1) [1896] 2 Q. B. 79; 3 Tax Cas. 476. (2) 1913 S. C. 810; 6 Tax Cas. 267.

On August 29, 1930, the Special Commissioners gave the following decision in writing: "1. The question for our decision is whether the contributions paid by the appellants to the Association are admissible deductions in arriving at the appellants' profits for income tax purposes. 2. A similar question came before the High Court in 1896 in *Rhymney Iron Co.* v. *Fowler* (1), when it was held that the contributions were not admissible deductions in arriving at the profits assessable. 3. The reasons for the decision in that case are set out by Bray J. in *Guest, Keen & Nettlefolds, Ld.* v. *Fowler.* (2) 4. Upon the evidence given before us we are satisfied that the objects of the Association have altered very considerably since 1896, partly owing to changing conditions under which trade is carried on and partly owing to the legislation affecting the coal mining industry since 1912. 5. In so far as the object of the Association is still to pay its members an indemnity in the event of deficiency or stoppage of output caused by strikes, etc., we must hold that the *Rhymney* case (1) is binding upon us. 6. In our opinion we are entitled to examine the various objects to which the contributions are applied: see *Adam Steamship Co.* v. *Matheson* (3), and in so far as the objects are different and separable, we should allow as a deduction that part of the contributions which is applied towards a proper trading expense. 7. In view of the decision in the *Lochgelly* case (4) we allow that part of the contributions applied to the Conciliation Board and disallow that part applied to the Mining Association of Great Britain. 8. As regards the rest of the contributions we allow as a deduction all except as indicated in para. 5 hereof."

Efforts were made by the parties to agree the correct figures of assessments in accordance with the decision of the Special Commissioners, but no agreement could be reached, because the parties were unable to agree upon the correct interpretation of that decision, and the Special Commissioners accordingly granted further hearings.

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(1) [1896] 2 Q. B. 79; 3 Tax Cas. 476.
(2) [1910] 1 K. B. 713; 5 Tax Cas. 511.
(3) 1921 S. C. 141; 12 Tax Cas. 399.
(4) 1913 S. C. 810; 6 Tax Cas. 267.

On February 9 and June 23, 1931, the further hearings took place.

It was contended on behalf of the appellants that on the true interpretation of that decision the appellants were successful, except as to those parts of the subscriptions which were applied to the payment of indemnities to members and as subscriptions to the Mining Association of Great Britain under the *Rhymney Iron Co.* case (1) and the *Lochgelly Iron and Coal Co.* case. (2) In support of that contention the appellants relied on clause 8 of the decision.

It was claimed by the Crown, on the other hand, that clause 6 of the decision must be taken as governing the whole decision, and that it was necessary to examine the objects to which the contributions had been applied by the Association.

The Special Commissioners informed the parties that they intended that the principle set out in clause 6 of their decision should govern the whole decision, and that it was necessary to examine the objects to which the contributions had been applied by the Association. They further explained that they were under the impression that Mr. Gibson's evidence at the first hearing had dealt with all the items of expenditure by the Association, and that clause 8 of their decision was written under that mistaken impression. From the income and expenditure accounts of the Association for the fifteen months ended March 31, 1928, it appeared that the total sum received by the Association by way of calls amounted to 155,348*l*. 15*s*. 7*d*. Of that sum 58,759*l*. was unexpended at March 31, 1928, and was carried forward to the next year. They decided that no part of the appellants' share of the last mentioned sum should be allowed as a deduction in the year in which it remained unexpended, and that that sum should be carried forward into the next year and added to the amount of the subscriptions in that year.

The parties thereupon agreed the amount of these subscriptions which should be allowed as deductions in accordance with the Commissioners' decision, and they therefore allowed 82*l*. for the year 1928–29, and 89*l*. for the

(1) [1896] 2 Q. B. 79; 3 Tax Cas. 476. (2) 1913 S. C. 810; 6 Tax Cas. 267.

year 1929–30, being the amounts agreed between the parties.

The appellants requested the Special Commissioners to state a case, and the Commissioners stated the present case accordingly.

Raymond Needham K.C. and *J. S. Scrimgeour* for the appellants.

Sir T. Inskip A.-G. and *R. P. Hills* for the respondent.

FINLAY J. This is an appeal by the Thomas Merthyr Colliery Co., Ld., against a decision of the Commissioners for the Special Purposes of the Income Tax Acts regarding two additional assessments to income tax which had been made upon the appellants, the one for the year ending April 5, 1929, and the other for the year ending April 5, 1930. The appellants are members of the Monmouthshire and South Wales Coal Owners' Association, and they paid subscriptions to the funds of that Association. In returning the profits of their business for the purposes of income tax for the two years mentioned they claimed to make deductions in respect of the subscriptions paid by them to the Association for these years, and it was in consequence of the disallowance of these deductions that the additional assessments in question were made upon them.

The whole of the facts and of the proceedings before the Commissioners are clearly set out in the case stated. [His Lordship stated the facts, the contentions of the parties before the Commissioners, the original decision of the Commissioners, the subsequent discussion before them, and their further decision, all substantially as above set out, and continued as follows :] Now, that represents the substance of the case. I can, of course, deal only with questions of law, and the case appears to me to raise these questions of law: The first, and I think the most important question, is whether the *Rhymney Iron* case (1) is now a binding decision which I ought to follow ; secondly, were the Commissioners right in the application which they made of the *Lochgelly Iron and Coal Co.'s* case (2) ; and, thirdly, were the Commissioners right in law in applying, as they proposed to do, the case of *Adam Steamship Co.* v. *Matheson*? (1) It was suggested to me by Mr. Needham, in his very able argument yesterday, that there was another point. I do not think he said exactly that it was raised by the case, but in the light of his argument I have looked through the case again, and it seems to me to be clear that it is not raised there. At all events Mr. Needham suggested that there was another point which was intended to be raised by the case, and asked me to send the case back to the Commissioners upon that point. I shall not fail to deal with that contention, but I will do so after I have dealt with the questions which in my opinion are raised by the case.

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(1) [1896] 2 Q. B. 79; 3 Tax Cas. 476. (2) 1913 S. C. 810; 6 Tax Cas. 267.

The first question, as I have indicated, is whether the Commissioners were right in taking the view that they were bound by *Rhymney Iron Co.* v. *Fowler*. (2) That is a decision of considerable age, having been pronounced in the year 1896. It was the decision of a Divisional Court consisting of Pollock B. and Bruce J., and it relates to a subscription to this very Association. The gist of the decision is to be found in the judgment of Pollock B., where he says: "When we come to the words of the Act specifying the deductions disallowed, which are these, 'any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade,' it seems to me, without adding to those words, it would be sufficient to say this is not money laid out for the purposes of such trade; it is money laid out in order to provide for an unfortunate contingency, by reason whereof the trade cannot be worked. That is a very different thing." (3) It was contended by Mr. Needham that that was a decision which I need not follow and ought not to follow. As against that, the first thing to be said is that so far as I can discover the *Rhymney Iron* case (2) has never been specifically disapproved by any Court. There is a later decision in *Guest, Keen & Nettlefolds,*

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(1) 1921 S. C. 141; 12 Tax Cas. 399.

(2) [1896] 2 Q. B. 79; 3 Tax Cas. 476.

(3) [1896] 2 Q. B. 79, 83; 3 Tax Cas. 476.

Ld. v. *Fowler* (1), where Bray J. discussed and distinguished that case, but certainly expressed no disapproval of it. Mr. Needham frankly said that he could not put before me any decision in which the *Rhymney* case (2) had been disapproved or even doubted. The substance of his argument, I think, can be represented by saying that he contended that none the less the principles which have been enunciated in later cases show that the principle upon which the *Rhymney* case (2) is based cannot be correct. I desire to say at once that I was impressed by his argument. He said that it has been laid down in a series of cases, and particularly that it has been laid down in emphatic terms by the present Master of the Rolls in *Thomas* v. *Richard Evans & Co.* (3), that a premium paid for insurance in the ordinary case is a proper subject of deduction. What the Master of the Rolls said was: "When one has come to see that that is so, these sums which are paid for insurance are, like other costs of insurance, deductible from the profits and gains which are the subject of income tax." (4) The *Rhymney* case (2) does not appear to have been cited to the Court in that case. It is not mentioned in the judgments and no disapproval is expressed of it. I may further mention that the insurance in that case was of a different sort from that in the present case, relating as it did to workmen's compensation.

In these circumstances the question—I confess a question not free from difficulty—which arises is whether the *Rhymney* case (2) ought still to be followed. I have looked at the text-books, and I find it cited there without any disapproval. It is a case which has stood not disapproved for many years. Impressed as I was by Mr. Needham's argument, the conclusion at which I have arrived is that the Attorney-General was right in saying that there is nothing which would justify me in holding that the *Rhymney* case (2) had been overruled so as not to be still a binding authority. The Attorney-General called my attention, very properly, to the various difficulties which arise in the application of these rules about deductions. He cited to me the well known judgment of Lord Loreburn L.C. in *Strong & Co.* v. *Woodifield.* (1) That case undoubtedly does lay down in an authoritative form the general principles applicable, and it shows that one has to be extremely careful to recollect that, while general trading conditions may be a useful guide, the first thing to have regard to is the language of the Act. Considering the question as anxiously as I can, I have arrived at the conclusion that if *Rhymney Iron Co.* v. *Fowler* (2) is to be disregarded, if it is to be overruled, that must be done by a higher Court than this, and after full argument in which the various authorities and the principles applicable can be fully considered. I therefore hold, being indeed constrained to do so, that the *Rhymney Iron* case (2) is an authority which I ought to follow. Holding that view, I think it is much better that I should not criticize that case. It is not desirable, I think, that a Court should criticize a decision by which it holds itself bound. It is much better, if the present case is to be taken elsewhere, that the *Rhymney Iron* case (2) should be left to those who can authoritatively consider it and say whether it is right or wrong. Expressing no opinion of my own, I hold that the Special Commissioners were right when they said that the *Rhymney Iron* case (2) was a decision which ought to be applied and followed. That admittedly disposes of the case in so far as it relates to the indemnity.

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(1) [1910] 1 K. B. 713; 5 Tax Cas. 511.

(2) [1896] 2 Q. B. 79; 3 Tax Cas. 476.

(3) [1927] 1 K. B. 33; 11 Tax Cas. 790.

(4) [1927] 1 K. B. 33, 54; 11 Tax Cas. 790, 827.

I now come to the next question—namely, whether the *Lochgelly Iron and Coal* case (3) ought to be followed. It was not, I think, seriously disputed that that was a decision which I ought to follow. It is a decision of the First Division of the Inner House of the Court of Session in Scotland, and the leading decision was delivered by the then Lord President, Lord Dunedin. In his decision the Lord President definitely lays it down that a subscription to the Mining Association of Great Britain is not an expense which can be deducted. I think that the Special Commissioners rightly held that they ought to follow, as I ought to follow, the decision in the *Lochgelly Iron and Coal* case (1), and, in the light of that decision, it becomes clear that the Commissioners correctly held that the part of the subscriptions which was applied to the Mining Association of Great Britain could not be deducted. It is, of course, equally clear, again following that decision, that the Commissioners were correct in saying that they ought to allow that part of the contributions which was applied to the Conciliation Board, because that precise point was also there decided.

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(1) [1906] A. C. 448.

(2) [1896] 2 Q. B. 79; 3 Tax Cas. 476.

(3) 1913 S. C. 810; 6 Tax Cas. 267.

That disposes of the two main questions, of law at all events, which were raised by this decision of the Commissioners. It is proper, however, that I should say something about clause 6 of their decision, which the Commissioners subsequently explained was intended to be its governing clause, apart from the particular matters which they held, and as I have already expressed the view rightly held, that they were bound by authority to decide in a particular way. What they did, as I understand, with regard to the rest of the case was to apply the decision in *Adam Steamship Co.* v. *Matheson* (2), and applying that decision, they proceeded to examine the various matters to which the subscriptions were applied and to decide as to each of them whether they considered that it was a proper trading expense. It seems to me, after looking at the decision in *Adam Steamship Co.* v. *Matheson* (2), and considering the opinions there expressed in the First Division of the Court of Session, and particularly the opinion of Lord President Clyde, that that case justifies the course which the Commissioners took. *Matheson's* case (2) is a convenient case to refer to, but the argument both of Mr. Needham and of the Attorney-General satisfied me that it is not the only case which might have been referred to as justifying what I may conveniently call this principle of differentiation, the principle of course being that where it is not possible to say either that the whole of the subscription to the Association is deductible, or that none of it is deductible, those parts which may be deducted should be distinguished

(1) 1913 S. C. 810; 6 Tax Cas. 267. (2) 1921 S. C. 141; 12 Tax Cas. 399.

from those which may not. That being so, it becomes necessary, of course, to analyse the subscription, and the general principle as stated by the Commissioners in clause 6 of their decision appears to me to be open to no criticism at all in point of law.

That exhausts the questions which arise upon the case.

It is now proper that I should say a word about a matter which was mentioned earlier but became prominent only at a very late stage of the argument. Mr. Needham then invited me to say that the case ought to go back to the Commissioners, on the ground that a point was raised, and prominently raised, before the Commissioners as to the principle upon which the differentiation ought to be made, and, if I followed him, the point which he desired to argue was this: that the Commissioners had gone wrong, because they had refused to allow certain expenses of the Association, thinking they were of a capital nature. Looking at the case stated—and I presume that, like other cases stated, it went backwards and forwards between the parties—I think it is perfectly clear that no such point was in the view of the Commissioners, or, I may add, in the view of the parties, intended to be raised. It seems obvious that, if it had been intended to raise such a point as that, the case would have been stated very differently. In view of Mr. Needham's argument I have looked at the accounts which were attached to the case, and they appear to me to yield no materials for deciding this point. My view is that the case was intended to raise, and did raise, the question, which is no doubt of the highest importance—namely, whether the *Rhymney* case (1) is still binding, and that it was also intended to raise what is without doubt also a question of importance—namely, whether the *Lochgelly* case (2) correctly lays down the principles applicable in the matters with which it deals. It was intended to raise these questions and to raise no other, and if it is now desired to raise other points I do not think that can properly be done in this case. This case clearly is drafted and designed to raise different points altogether from that now sought to be

(1) [1896] 2 Q. B. 79; 3 Tax Cas. 476. (2) 1913 S. C. 810; 6 Tax Cas. 267.

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raised. If there are other points which it is now desired to raise, they must be raised separately and distinctly. The Crown resisted the sending back of the case, Mr. Hills very frankly stating that as he was not before the Special Commissioners he did not know exactly what had taken place. Mr. Needham read to me various extracts from a shorthand note which certainly suggested that there was some considerable confusion before the Special Commissioners, but did not satisfy me that this point was at all clearly taken. My view, as I have already indicated, is strongly confirmed by the fact that in the case stated, which I cannot doubt the parties had an opportunity of seeing, it is clear that the point in question was not raised. In those circumstances I do not think that I ought to give effect to the application which Mr. Needham made to have the case sent back.

I think I ought to decide the case upon the questions which are raised upon it. The substance of my view may be very concisely expressed. In my opinion the Commissioners were right in following and applying the *Rhymney Iron* case. (1) In my opinion they were right in following and in applying, as they did, the *Lochgelly Iron and Coal* case. (2) In my opinion they were right in applying as they did apply the *Adam Steamship* case (3), and in differentiating and separating as they did separate. Further, I am not satisfied that in the differentiation which they undertook they made any error of law, and, I might further add, though it is quite unimportant, that I am not satisfied that they made any error of fact.

Therefore, the result is that in my opinion it is impossible for me to say that these Commissioners have gone wrong in point of law, and the appeal must accordingly be dismissed.

Appeal dismissed.

J. R.

Thomas Merthyr Colliery Company, Ld., appealed. The appeal was heard on July 22 and 25, 1932.

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(1) [1896] 2 Q. B. 79; 3 Tax Cas. 476. (2) 1913 S. C. 810; 6 Tax Cas. 267.
(3) 1921 S. C. 141; 12 Tax Cas. 399.

On the appeal the question whether the part of the subscriptions to the general funds of the Association applied by the Association to the Conciliation Board were proper deductions from the profits or gains of the colliery company was not argued.

Raymond Needham K.C. and *J. S. Scrimgeour* for the appellants. *Rhymney Iron Co.* v. *Fowler* (1) ought no longer to be followed, therefore the part of the subscription in any year to the Association applied for an indemnity against loss due to deficiency or failure of output by the colliery company resulting from strikes ought to be allowed as a proper deduction from profits or gains of the company for the purpose of income tax under r. 3 of the Rules applicable to Cases I. and II. of Sch. D to the Income Tax Act, 1918. It is a disbursement "wholly and exclusively laid out or expended for the purposes of the trade." Since the decision in the *Rhymney Iron Co.'s* case (1) a wider view has been taken. Thus in *Thomas* v. *Richard Evans & Co.* (2) a payment for an indemnity against liability to pay workmen compensation under the Workmen's Compensation Acts was allowed as a proper deduction. There is no distinction between a workman ceasing to work owing to disablement by accident and his ceasing to work by reason of a strike. The premiums in this case were paid against partial strikes, and it cannot then be said that the business was not being carried on. The indemnity received by the subscriber is a trading receipt and is taxable, and if so, the cost of obtaining it is an expense of the business. It is well settled that compensation for loss of profits resulting from being precluded from carrying on a trade must be brought into account in computing income chargeable to tax: *Rex* v. *B. C. Fir and Cedar Lumber Co.* (3); *J. Gliksten & Son, Ld.* v. *Green.* (4) Here the indemnity when received by the colliery company would be included in revenue. The test to be applied as to the admission of expenditure as a debit item of a trading account is whether it was paid out of

(1) [1896] 2 Q. B. 79; 3 Tax Cas. 476.
(2) [1927] 1 K. B. 33; 11 Tax Cas. 790.
(3) [1932] A. C. 441.
(4) [1929] A. C. 381; 14 Tax Cas. 364.

fixed or circulating capital : *Anglo-Persian Oil Co.* v. *Dale* (1) ; see also per Lord Blanesburgh in the *British Columbia* case. (2)

Secondly, it is contended that *Lochgelly Iron and Coal Co.* v. *Crawford* (3) was wrongly decided in so far as it determined that contributions to the Mining Association of Great Britain were not proper deductions. In any case the decision did not preclude the Commissioners from considering the function of that Association, and the case should go back to them to do so.

Sir Thomas Inskip A.-G. and *Reginald Hills* for the Crown. The *Rhymney* case (4) is a direct authority on the first point argued for the appellants and ought to be followed. It is an authority on the general principles applicable in deciding whether an expense is properly deductible from profits of a business for income tax purposes. It is not all expenditure that may be commercially advantageous that is allowed: *Union Cold Storage Co.* v. *Jones.* (5)

[LORD HANWORTH M.R. We are prepared to say that the *Rhymney* case (4) was correctly decided and should be followed by the Court in the present case.]

The only remaining question is as to the contribution to the Mining Association. On this point the Court ought to follow *Lochgelly Iron and Coal Co.* v. *Crawford.* (3) The Mining Association apply their funds in some part for propaganda purposes, and although this use of funds may be desirable, the subscription to that Association cannot be an expenditure for the purposes of the appellants' trade.

Raymond Needham K.C. in replying referred to *Ensign Shipping Co.* v. *Inland Revenue Commissioners* (6) ; *Charles Brown & Co.* v. *Inland Revenue Commissioners* (7) ; *Short Brothers, Ld.* v. *Inland Revenue Commissioners.* (8)

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(1) [1932] 1 K. B. 124, 138.

(2) [1932] A. C. 441, 446.

(3) 1913 S. C. 810; 6 Tax Cas. 267.

(4) [1896] 2 Q. B. 79; 3 Tax Cas. 476.

(5) (1924) 8 Tax Cas. 725, 736, 738, 740.

(6) (1928) 12 Tax Cas. 1169, 1179.

(7) (1930) 12 Tax Cas. 1256.

(8) (1927) 12 Tax Cas. 955.

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LORD HANWORTH M.R. This appeal fails. It is important to see exactly what is the point that we have to decide.

The Thomas Merthyr Colliery Company, Ld., appealed against two additional assessments made for the financial years ended April 5, 1929, and April 5, 1930. The additional assessment for the first financial year was 312*l.* and for the second year 59*l.* We are told in the Case that these additional assessments arise out of the disallowance in computing the assessable profits of the company of the deduction of these two sums, being sums paid by the company by way of subscriptions to the Mining Association; and the question that comes before us is whether or not these subscriptions are proper deductions in computing the profits of the company for assessment to income tax.

The payments are made by a colliery company carrying on a mining business, and they can be divided into three parts. A portion of the sum paid in each year was applied as a contribution to the Conciliation Board acting between the employers and the employed and another portion to the general purposes of the Mining Association, an Association which has many activities, propaganda among others, being, in the broad sense of the word, an Association that looks after the affairs of the mining industry and the interests of those who are engaged in it.

The third part is a contribution for an indemnity against deficiency or failure of output owing to strikes, and it is in regard to that that the question arises which was neatly put by Mr. Needham in argument when he opened this case: does the decision in *Rhymney Iron Co.* v. *Fowler* (1), decided in 1896, still stand good? It is suggested that as time has gone on there has been a recognition that trading costs must be looked at from a broader point of view than they were thirty-six years ago; that now it has been decided, for instance, in *Thomas* v. *Richard Evans & Co.* (2), that the expense of insuring for the purpose of meeting the contributions that have to be paid under the Workmen's

(1) [1896] 2 Q. B. 79; 3 Tax Cas. 476.

(2) [1927] 1 K. B. 33; 11 Tax Cas. 790.

Compensation Act is a deductible expense. In that case I said that the payments made were for the purpose of insurance and for nothing else. When that is realized the sums paid for this insurance are, like other costs of insurance, deductible from the profits and gains, because this insurance is part of the system of carrying on the business of the mine.

In other cases, of which a number of illustrations have been given, it is pointed out that a sum which is received by a company carrying on its business may still be profits, although they seem to arise out of a temporary paralysis of the business which is carried on. In the *Ensign Shipping Co.'s* case (1) during a coal strike two ships belonging to the appellant company which were ready to proceed to sea with cargoes of coal were detained in port by order of the Government for periods of fifteen and nineteen days. Money was paid as compensation to the company by the Government for having held back these vessels. It was really a payment in the nature of demurrage made during a time when the actual business in which those ships were engaged—namely, the carrying of coal—was paralysed. Nevertheless, it was a sum received in lieu of the money which would have been earned by the transit of those ships on the sea, and was brought into tax.

In the present case the position as found by the Commissioners is: "Upon the evidence given before us we are satisfied that the objects of the Monmouthshire and South Wales Coal Owners' Association have altered very considerably since 1896, partly owing to changing conditions under which trade is carried on and partly owing to the legislation affecting the coal mining industry since 1912." And then they go on to hold that "in so far as the object of the Association is still to pay its members an indemnity in the event of deficiency or stoppage of output caused by strikes, etc., we must hold that the *Rhymney* case (2) is binding upon us."

The terms under which a payment will be made to the company in respect of the sums paid by it by way of

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(1) 12 Tax Cas. 1169, 1179.

(2) [1896] 2 Q. B. 79.

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subscription to the Association are defined in clauses 80 and 81 of the agreement before us. I think one may say, broadly, that if the premium has been paid for the purpose of enabling the company to carry on its business better, so that the sum which would be received would be a trading receipt, then the sum that is expended in that insurance is an allowable deduction. In the *Gliksten* case (1) the company were carrying on a timber merchant's trade. They had a policy of fire insurance. A fire took place, and the wood which they would have sold in the market was burned. The result was they were reimbursed the value of the timber by the insurance company. The timber was turned into money, not by an ordinary sale in the market, but by the action of the fire and the payment of the insurance, and it was held that the money in the pockets of the timber merchants in lieu of the timber was money derived from their carrying on their business in the ordinary course; it was money derived from the timber, although the channel through which it was received was a fire and not an operation on the market. If, therefore, the money to be received under clauses 80 and 81 is money which is to be deemed an ordinary trading receipt, it would seem by parity of reasoning that the money expended on the premium would be a deductible sum in carrying on the ordinary business of the company. We have not got to decide that, but I agree with what Romer L.J. said in the course of the argument, that there is a close connection between a payment for the purpose of being reimbursed in certain events and the sum received, as in the *Gliksten* case (1), so that there will be a right to deduct from profits a sum paid for premium in order to ensure the receipt of money which, when received, will be a trading receipt.

Let me deal first with the part of the subscription which is applied as a contribution to the Conciliation Board. That has been held in the *Lochgelly Iron Co.'s* case (2) to be a proper deduction. The basis on which it is held to be a proper deduction is thus stated by Lord Dunedin, then Lord

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(1) [1929] A. C. 381; 14 Tax Cas. 364.

(2) 1913 S. C. 810; 6 Tax Cas. 267.

President (1): "It was a machinery that the coalowners were entitled to keep up just as one might as proper expenses have a legal secretary, although fortunate in having no law expenses or litigation in a particular year." It was "a machinery by which disputes between the workmen and the employer may be settled, and by that means expenses kept down and more profits earned." That reasoning seems good and valid to-day, and it justifies the allowance of the deduction in respect of the contribution to the Conciliation Board. But it was in the same case that the contribution to the Mining Association was definitely disallowed, and I turn, therefore, to consider the rule under which a deduction is admissible. It is r. 3 of the Rules applicable to Cases I. and II. of Sch. D. The Income Tax Act, as was pointed out by Lord Loreburn in *Strong & Co.* v. *Woodifield* (2), does not state affirmatively what may be deducted. It merely furnishes negative information. But Lord Davey says there, referring to the terms of the rule, that no sum shall be deducted in respect of expenses not being money wholly and exclusively laid out and expended "for the purpose of the trade," and he continues (3): "These words are used . . . . and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits."

Lord Sumner, in *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (4), points out (5) that r. 3 may be given an affirmative form, but whether in the negative or affirmative form the payment to be allowed must be one that fulfils the qualifications stated by Lord Davey (3), of being necessary to enable the company to earn its profits, and it must have been "wholly and exclusively" laid out for that purpose. This purpose and the

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(1) 6 Tax Cas. 278.
(2) [1906] A. C. 448, 452.
(3) Ibid. 453.
(4) [1915] A. C. 433.
(5) Ibid. 468.

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narrowing effect of the two adverbs used, "wholly and exclusively," must always be kept in mind. It is quite easy, as Lord Dunedin said in the *Gliksten* case (1), to fall into the quagmires on either side of the path. It is necessary to tread a narrow path in these income tax cases. It is that stern rule which must be followed. There are many items of expenditure which a prudent director might incur, but the dictates of prudence are not the true test. Bearing in mind these limitations, the present outlay on insurance to make deficiencies good, should a lean time arise, by a stoppage of work, illustrates the prudence of the directors, rather than the necessity of the trade, or an outlay to earn profits. It makes provision for an unfortunate contingency.

I turn for a moment to look at the actual terms of the *Rhymney* case. (2) There, "the owners of a colliery were subscribers to a coal owners' association, which indemnified its subscribers against losses occasioned by strikes." It was the same Association.

It was there held "that the money sought to be deducted was not money wholly and exclusively laid out for the purposes of trade." Pollock B., in giving the judgment, says (3): "There are a great many things that a prudent trader might treat as deductions, because he wished to make a fund to provide against future accidents, and things of that kind, which are not dealt with at all by the Income Tax Acts." He and Bruce J. founded themselves upon the narrow words which are now found in r. 3.

It appears to me that the contributions to meet losses by reason of strikes were not paid for the purpose of something arising out of and in the course of the ordinary working of the mine and the seeking of gains. They have not got the same characteristics as the premiums paid for the purpose of insurance against the liability under the Workmen's Compensation Act. They are expenses incurred by the wisdom of the directors, but they do not, as I understand, enure to secure a profit of the trade as being carried on, but to supply a deficiency at a time when there is no trade being carried on.

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(1) [1929] A. C. 381, 385; 14 Tax Cas. 364.

(2) [1896] 2 Q. B. 79.

(3) Ibid. 83.

Dealing with the first point which Mr. Needham made, and which, I think, is the really serious point in the case: Has there been an alteration in the decisions of the Courts such as to make the *Rhymney* case (1) no longer binding? I do not find any laxity creeping in. The Courts have still to go back to those adverbs in and the terms of r. 3. That is illustrated in *Strong & Co.* v. *Woodifield* (2); *Thomas* v. *Richard Evans & Co.* (3), and the *Gliksten* case. (4) At all times the Court has felt called upon to tread the narrow path and to see whether the expense in question has been laid out for the purposes of the trade wholly and exclusively; and if not it must disallow the outlay.

For these reasons, holding that the *Rhymney* case (1) was well decided, I think that the conclusion reached by the Commissioners and by Finlay J. was right, and the appeal must be dismissed with costs.

Slesser L.J. I agree. I propose, in the first place, to say a few words with regard to the cases which have dealt with insurances and contributions in the nature of insurance which have been held properly to be deductible from trade profits for the purposes of income tax assessment, and then to ask myself whether the present case does or does not fall within the principles laid down by those cases.

The first case to which I would refer for this purpose is the well known authority, *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (5), in which a claim was made for a deduction for fire and licence insurance premiums. That claim was allowed, and Lord Atkinson said (6): " As to item C, the purposes for which the insurances upon the premises are effected are set out. They are found to be usual and proper trade outgoings, and are made as such by the appellants. They are designed to cover the loss of the fabric by fire and the loss sustained if the licences were not renewed. *Smith* v. *Lion Brewery Co.* (1) applies, I think, to the latter disbursement" —that is the insurance against the non-renewal of licences— "and the remarks I have already made apply to the" remaining items. So that we start with this position, that a premium paid for the purpose of fire insurance is a permissible deduction. Secondly, it has been held in the case cited to us by Mr. Needham of *Thomas* v. *Richard Evans & Co.* (2), that a contribution to an association to cover liability for compensation under the Workmen's Compensation Act is a proper deductible expense; and, finally, it has been held in *Rex* v. *B. C. Fir and Cedar Lumber Co.* (3), a case decided in the Privy Council, upon a British Columbia Taxation Act containing language very different from the Income Tax Acts, that it might be, at any rate under the provisions of that Act, that where insurance is in respect of loss of net profits the amount received under the insurance policy would be taxable income, with the result presumably that the premiums paid therefor would be deductible expenses, though that matter was not expressly decided.

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(1) [1896] 2 Q. B. 79.

(2) [1906] A. C. 448.

(3) [1927] 1 K. B. 33; 11 Tax Cas. 790.

(4) [1929] A. C. 381; 14 Tax Cas. 364.

(5) [1915] A. C. 433; 6 Tax Cas. 399.

(6) [1915] A. C. 452; 6 Tax Cas. 424.

As against those authorities, we have the *Rhymney Iron Co.* v. *Fowler* (4), where it was held that a subscription by the owners of a colliery company to a coalowners' association which indemnified its subscribers against losses occasioned by strikes, was not "money wholly and exclusively laid out for the purposes of trade." That case, if it is still good law, appears to govern the present one. A number of cases have been cited to us to indicate that the principle governing cases deciding what is "money wholly and exclusively laid out for the purposes of trade" has suffered a considerable variation and extension in favour of the subject since the decision in the *Rhymney Iron Co.* case. (4) The proposition, that a greater degree of indulgence in the nature of deductions is now allowed than formerly, is based, I think,

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(1) [1911] A. C. 150; 5 Tax Cas. 568.
(2) [1927] 1 K. B. 33; 11 Tax Cas. 790.
(3) [1932] A. C. 441.
(4) [1896] 2 Q. B. 79.

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in part upon what I may conveniently call the Brewery cases, where the question whether payments for the maintenance and repair of tied houses and the like has had to be considered, and, secondly, upon a number of cases which arose out of the War by which forced sales, requisitions and various interferences with normal trading were brought about by the intervention of the Government owing to the necessities of the case, and questions arose whether compensation or profits accounted for by the Government, and the like, were or were not to be treated as income for the purposes of either income tax or excess profits duty.

I do not think it necessary here to consider those cases, because the real principle was determined once and for all in *Inland Revenue Commissioners* v. *Newcastle Breweries.* (1) I look upon the other cases as applications, varying with the particular facts, of the principles there established.

I find in the speech of Lord Phillimore all that I need to distinguish that class of case from the present. He says (2): "It is quite usual in trade that manufacturers should from time to time for particular reasons dispose of the raw material which in ordinary course they make up for sale. The rum was purchased for trade purposes, and the particular sale was none the less a trade sale because the trade was forced upon the appellant company." And, clearly, where the results of the trade are ultimately ascertainable in terms of money, though the normal course of trading may have been diverted by Government intervention, the principle that it is income can readily be understood. But such cases afford no guidance, in my view, to the problem which we have here to consider.

The problem which we have to consider is this: Can it be said that the expense of the insurance against loss here entered into, though a prudent thing possibly to do, is an expenditure "wholly and exclusively laid out or expended for the purposes of the trade"? In my opinion, it cannot. In all the cases which I have mentioned (the fire insurance cases, including *Gliksten's* case (1), where timber was insured against fire) there is a direct nexus between the trade as such and the expenditure incurred. In my opinion, the present case is one where the expenditure is not in relation to the trade, but in relation to the absence of trade, a view I think indicated clearly in the *Rhymney* case (2), with which I am in agreement. There Pollock B. said (3): "It is an indemnity for what may happen from many causes . . . . namely, that the colliery is not working, and, while that is so, a loss is occasioned." Again (4), "it is money laid out in order to provide for an unfortunate contingency, by reason whereof the trade cannot be worked." I find the greatest difficulty in taking the view that an expense which is incurred exclusively for the purposes of the trade can be extended to cover an expense wholly and exclusively laid out for the purpose of protecting the trader against the absence of trade; not an absence caused by a specific event such as a fire, which may convert property into money, as in the *Gliksten* case (1), but a complete absence of trade as such.

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(1) (1927) 12 Tax Cas. 927.

(2) Ibid. 954.

In the present case, clause 80 of the agreement entered into between this coalowner and the Association does not go so far, I think, as in the *Rhymney* case. (2) We do not know the exact terms of the rule in the *Rhymney* case (2), and therefore I will say little about it; but in the present agreement it is not every strike from which the coalowner is protected. It is first: "In case of a strike on the part of the workmen, or any number of them, before or in consequence of the decision of the Board, or of the Association, and if the action of the member in reference to such strike was ratified"—it will be observed that the Association remain at all times the master of the event, because if the strike be not in consequence of its decision, or be not ratified by it, then it is not liable to pay the moneys which otherwise it might be liable to pay as indemnities under clause 81 and the subsequent clauses. Then, as the Attorney-General has pointed out, it

(1) [1929] A. C. 381; 14 Tax Cas. 364.

(2) [1896] 2 Q. B. 79.

(3) Ibid. 83.

(4) Ibid. 84.

is not limited to strikes. In the case of restriction or a cessation of output at the colliery in consequence of the member acting in compliance with the direction of the Association, the indemnity may be paid; then again, whether the output of coal be restricted, or a direction of this Association bring about a cessation of output, either by ordering a cessation of labour (what is called a lock-out), or by putting an embargo upon the sale of coal, an indemnity may be paid; but it is only to be paid if the conditions required by this Association are complied with.

In my view, it would be very difficult indeed, on the particular agreement entered into in this case, to maintain that an indemnity so paid at the election of a third party, who was to decide whether the conditions were or were not fulfilled (an indemnity which probably, though I do not base myself upon this, is based upon a contract in restraint of trade and therefore unenforceable), would be a taxable gain or profit arising or accruing from the trade of the coalowner.

Everything points to a separate undertaking or adventure, with special conditions and special requirements of its own. But, however that may be, I am clearly of opinion that an expenditure in respect of the possibility of receiving that indemnity sc controlled by a third party would not be one which could be said to be "wholly and exclusively laid out or expended for the purposes of trade." I agree, however, with the contention of Mr. Needham, though I do not think it is necessary to decide it here, that it would be very difficult to argue successfully that, if the gains accruing from this indemnity were taxable profits, the premium which was paid for the purpose of earning those profits was not itself a disbursement or expense to be taken into account in computing the amount of the profit or gain to be charged. But we have not got to consider that point finally, and it may be, as the learned Attorney-General has said, that we have not the material to decide it.

For my part I am content to say that the appellants have failed to prove that the later decisions have altered the weight or authority of the *Rhymney* case (1), and have failed to show any particular facts in this case which would take this part of their case out of the authority of that decision.

As to the second point, it is sufficient to say, I think, that the authority of the Scottish case of *Lochgelly Iron and Coal Co.* v. *Crawford* (2) applies. The rules of the Mining Association, to which this company has mediately subscribed through the South Wales Coal Owners' Association, go very far beyond the immediate needs of its business, so that the contributions cannot be said to be "wholly and exclusively laid out or expended for the purposes of the trade." The objects of the Mining Association of Great Britain are of very varying kinds, and therefore, in my view, *Lochgelly Iron and Coal Co.* v. *Crawford* (2) should be followed by this Court. In my view it cannot be said that those subscriptions are deductible as expenses incurred with a view to earning the profits of the appellants in this case.

I agree that this appeal must be dismissed.

Romer L.J. I agree. In my opinion, any sums received by the appellants for the purposes of indemnifying them against loss of profits occasioned by a cessation or restriction of output would not be a trading receipt, and for that reason I have come to the conclusion that the part of the subscription paid by the appellants to the Association which may be deemed to have been paid for the purpose of securing such a benefit is not a sum of money that has been "wholly and exclusively laid out or expended for the purposes of their trade." It is not money that has been expended for the purpose of earning the appellants profits.

So far as the *Rhymney* case (1) decided that, I think the case was rightly decided; but there are statements made by Pollock B. and Bruce J. in giving their judgments in that case which go further than I am myself prepared to go. They suggested that money paid for the purposes of preventing "deterioration of the colliery while it is not being worked"—

(1) [1896] 2 Q. B. 79.

(2) 1913 S. C. 810; 6 Tax Cas. 267.

to use the words of Pollock B. (1) ; and " the maintenance of the machine while the business is not being carried on "—to use the words of Bruce J. (2)—would not be payments " wholly and exclusively laid out or expended for the purposes of the trade." I am not prepared to say that. Unless the machine, the colliery, is kept in a state in which it can be worked and so profits made, obviously no profits will accrue to the trader and, that being so, any sums expended for the purpose of preventing deterioration and maintaining the machine while the business is not being carried on, would appear to be moneys that might properly be allowed as deductions in framing the accounts.

On the other question, the question relating to the subscription to the Mining Association, I have nothing to add to what has been said by the other members of the Court.

Appeal dismissed.

Solicitors : *Savage Cooper & Wright, for W. H. F. Barklam, Cardiff ; Solicitor of Inland Revenue.*

(1) [1896] 2 Q. B. 83. (2) Ibid. 84.

H. C. G.

1931
Feb. 25, 26,
27;
March 17.

GREEN STAR SHIPPING COMPANY, LIMITED *v.* THE LONDON ASSURANCE AND OTHERS.

Insurance (Marine)—General Average—Damage to Ship and Cargo by Fire and afterwards by Collision—Expenditure by Shipowner—Insurance on Hull including Institute Clauses—Insurance against Special Risks affecting Cargo's Proportion of General Average—Indemnity against Cargo's Proportion of General Average not otherwise recoverable—Balance of Expenditure not recoverable from Special Risk Insurers—Whether recoverable under Hull Policy or Indemnity—Marine Insurance Act, 1906 (6 *Edw.* 7, c. 41), *s.* 66, *sub-s.* 4.

While the plaintiffs' steamship was loading a cargo at New York under a contract of affreightment which provided for general average according to York-Antwerp Rules, a fire broke out in her holds which caused damage to the vessel and her cargo and in respect of which the plaintiffs incurred general average expenses. The steamer having reloaded part of that cargo and other cargo commenced her voyage, but was sunk in collision. Her cargo was then discharged and she was raised and taken to Philadelphia, where the voyage was abandoned, the plaintiffs incurring further general average expenses in respect of the collision. The plaintiffs were insured by a policy on the hull of the steamer containing the Institute Time Clauses; by two policies against special risks affecting the steamer's original cargo's proportion of general average disbursements; and by an indemnity as members of a club against cargo's proportion of general average not otherwise recoverable. After deduction from the plaintiffs' general average expenses of the salved value of the steamer, and of the salved value of the cargo, which was all that the plaintiffs could receive from the cargo owners, a certain amount of these expenses remained unsatisfied. In an action by the plaintiffs to recover this amount from the insurers it was admitted that the hull insurers were liable for a part thereof, and it was found that the special risk insurers were liable for another part thereof and no more, and as to the balance which still remained it was:—

Held, that in the circumstances and under s. 66, sub-s. 4, of the Marine Insurance Act, 1906, the hull insurers and not the club were the persons liable in respect thereof.

The Mary Thomas [1894] P. 108 considered and distinguished.

Action tried by Roche J. in the Commercial Court.

The Green Star Shipping Company, Ld., were the owners of the steamship *Andree.* On April 14, 1922, that vessel commenced to load a general cargo at New York for transatlantic ports under a contract of affreightment which provided for the adjustment of general average according to York-Antwerp Rules. On April 20, 1922, a fire broke out in the *Andree's* holds, doing serious damage to the vessel and to her cargo, which had to be discharged, and in respect of which various general average expenses were incurred by her owners. On May 21, 1922, the vessel, having been repaired, left New York for her intended voyage, part of the damaged cargo having been left at New York and sold or returned to shippers, part of that cargo having been reloaded, and other cargo shipped. On May 22, 1922, a collision took place between the *Andree* and the steamship *H. F. Alexander*, in consequence of which the *Andree* was sunk. The cargo was again discharged and the vessel was raised and taken into Chester, near Philadelphia, where the voyage was abandoned. Further general average expenses were incurred by the owners by reason of the collision.

By a policy of marine insurance dated July 7, 1921, and effected on behalf of the *Andree's* owners, the London Assurance had insured her hull and machinery in the sum of 5595*l.* (part of 100,000*l.*) for twelve months, the policy containing the Institute Time Clauses, clause 9 of which provided: "General average . . . . to be adjusted . . . . if the contract of affreightment so provides, according to York-Antwerp Rules, ... but in all matters not specifically referred to in York-Antwerp Rules 1 to 17 (1) inclusive, the adjustment shall be in accordance with the law and practice obtaining at the place where the adventure ends and as if the contract of affreightment contained no special terms upon the subject." By a further policy, in fact arranged in 1922 after the fire and before the collision, though dated February 3, 1925, and effected on behalf of the owners, the British Traders Insurance Company, Ld., insured at and from New York for the voyage in 7500 dollars, part of 30,000 dollars, against the usual perils, the *Andree's* cargo's proportion of general average disbursements as per specification or average disbursements clause attached, which contained the following stipulation: "On . . . . average disbursements applicable to cargo only. Interest admitted, amount at risk to be subsequently declared and valued. To pay the proportion attaching to any amount by which the property may be reduced in value owing to any subsequent accident, loss, damage, general average, salvage, or charges, without benefit of any other insurance." By another policy dated January 30, 1925, these general average disbursements were insured at Lloyd's on the same terms in 22,500, being the balance of the above mentioned 30,000 dollars. This last mentioned policy was underwritten by Mr. Arthur Henry Henderson in 400 dollars. At all material times the owners were members of the United Kingdom Mutual Steamship Assurance Association, Ld., which undertook, subject to its rules, to indemnify its members against divers liabilities, including cargo's proportion of general average which was not otherwise recoverable.

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(1) York-Antwerp Rules, 1890, provide by Rule XVII.: "The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed; . . . . deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average."

An average adjustment dated December 30, 1924, was made by Messrs. Willcox, Peck & Hughes of New York for the purpose of apportioning the general average expenditure of the plaintiffs as between ship and cargo. A further average adjustment dated October 2, 1925, was made by the same firm for the purpose of showing the respective proportions of their expenditure which the plaintiffs were entitled to recover from the British Traders Insurance Company and Mr. Henderson respectively. An average adjustment dated December 7, 1926, was made by Messrs. Manley Hopkins & Co. of London for the purpose of showing the proportions of their expenditure which the plaintiffs were entitled to recover from the London Assurance.

It appeared that the general average expenditure incurred by the plaintiffs in respect of the fire was about 63,000 dollars, and in respect of the collision about 180,000 dollars, making together about 243,000 dollars. The salved value of the steamer was about 116,000 dollars, and the salved value of the cargo was about 44,000 dollars, which latter sum was paid by the cargo owners to the plaintiffs, and to which the general average liability of the cargo owners was limited by the law and practice obtaining at Philadelphia where the adventure terminated. On deduction from the general average expenditure of the plaintiffs of the salved values of the steamer and cargo, there remained a sum of about 84,000 dollars to be made good to the plaintiffs by the various insurers or some of them (1); but questions arose as to the apportionment of that sum among these insurers.

By a writ originally dated January 26, 1928, but afterwards several times amended, the plaintiffs accordingly brought the present action against the London Assurance, the British Traders Insurance Company, the United Kingdom Mutual Steamship Assurance Association, and Mr. A. H. Henderson, claiming as against the first, second and fourth defendants for general average losses or disbursements under policies of marine insurance, and alternatively against the third defendants for an indemnity against liability for cargo's proportion of general average under their club rules, and payment thereof.

For the purposes of the action a statement of the facts not in dispute was agreed upon between the parties.

A. T. Miller K.C. and *R. I. Simey* for the plaintiffs.

W. N. Raeburn K.C. and *Sir Robert Aske* for the defendants the London Assurance.

G. R. Mitchison for the defendants the British Traders Insurance Company, Ld., and Mr. A. H. Henderson.

J. Dickinson K.C. and *Cyril T. Miller* for the defendants the United Kingdom Mutual Steamship Assurance Association, Ld.

Cur. adv. vult.

March 17. ROCHE J. This case raises questions of novelty and great difficulty in marine insurance law. These questions were very fully argued by counsel for the various parties, to whom I am much indebted for their assistance, and at the conclusion of the hearing I reserved my judgment.

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(1) The material provisions of the Marine Insurance Act, 1906, s. 66, are set out below in the judgment of Roche J.

The hearing proceeded upon the basis of an agreed statement of facts supplemented by the material contained in several average statements. It was agreed by counsel that I should deal in the first instance with principles only, leaving all questions of amount for subsequent settlement or determination. Accordingly, where figures appear in this judgment they are to be regarded as symbols only employed to identify the items in dispute and not as binding upon either the parties or the Court. [His Lordship stated the facts and continued as follows :]

As between the parties to the contract of affreightment on the facts and under the stipulations of the contract the position seems to me to be clear, especially after the authoritative exposition of the law as regards York-Antwerp Rules in the case of *Chellew* v. *Royal Commission on the Sugar Supply.* (1) The position and rights and liabilities of these parties I find to be as follows. The general average expenditure of the plaintiffs in connection with the first casualty (New York fire) was about 63,000 dollars. This figure, and consequently sums to be recovered in this action based thereon, may be subject to some reduction if actual payments are found to be less than certain estimated liabilities. Part of the cargo was discharged at New York and was not reloaded. The net value of such cargo which was saved by reason of the general average act was about 18,000 dollars. This 18,000 dollars' worth of cargo was the only property in the adventure which was available for the purpose of contribution in the first general average, because the expenditure occasioned by the second general average, the collision, fell to be deducted from the values of ship and cargo (see York-Antwerp Rule 17 (2)) for the purposes of the adjustment of the first general average. After this deduction was made the values of the rest of the cargo and of the ship were nil. Contribution from the owners of the cargo saved at New York was due up to its full value, and the plaintiffs have received

(1) [1921] 2 K. B. 627; [1922] 1 K. B. 12.

(2) See note (1) ante, p. 379.

in respect thereof a sum of rather over 18,000 dollars. Apart from this they have not received and are not entitled to any further contribution from owners of cargo. Accordingly they are out of pocket some 45,000 dollars of general average expenditure in respect of the fire. In respect of the second general average act the figures stand approximately as follows. The general average expenditure of the plaintiffs was about 180,000 dollars. The salved value of the ship at the termination of the adventure was about 116,000 dollars, and the salved value of the cargo was rather over 26,000 dollars. The owners of this cargo are liable to make contribution up to its full value, and the plaintiffs have received this contribution amounting to 26,249 dollars. Apart from this they have not received and are not entitled to any further contribution from owners of cargo. Accordingly they are out of pocket some 155,000 dollars of general average expenditure in respect of the collision. As to 116,000 dollars of this sum, that amount of the expenditure would clearly have to be borne by the ship, representing 100 per cent. of its salved value. The incidence of the balance of about 39,000 dollars alone has to be regarded when the policies come to be considered.

I now turn to the much more difficult question of the position as between the plaintiffs and their underwriters and the club. As I have stated above, the amounts to be considered for this purpose are sums of about 45,000 dollars in respect of the fire, and about 39,000 dollars in respect of the collision, 84,000 dollars in all. But the controversy is narrowed and the amount in dispute is diminished by reason of the following facts. The American adjusters have proceeded on the basis, and the hull underwriters agree, that the hull underwriters are on any view liable for a considerable part of this sum. Broadly speaking, the amount to be deducted from the above figure of 84,000 dollars and indisputably falling upon the hull underwriters is about 55,000 dollars to 56,000 dollars, leaving an amount in controversy of about 29,000 dollars. The main reason for this reduction in amount, as I gather, is as follows: the point of view of the American adjusters adopted by the underwriters was that for the purpose of ascertaining the ship's proportion of general average the value of ship and cargo had to be looked at and assessed at the time of the fire and of the collision respectively. So far as this point of view is advanced, as it is advanced, as a ground for limiting the extent of the liability of the hull underwriters, I will discuss it later in my judgment. At present I am merely explaining how the net figure in dispute of approximately 29,000 dollars is arrived at. To show what is the real controversy between the parties the explanation of how this figure of about 29,000 dollars is arrived at may be stated in another way as follows: The American adjusters treated two sums, not recovered from cargo but arrived at on the basis of the notional valuation of the cargo at the times of the fire and collision respectively, as constituting cargo's proportion of general average (beyond the sums of about 18,000 and 26,000 dollars in fact contributed). These sums were about 24,862 dollars in respect of the fire, and about 4780 dollars in respect of the collision, or somewhat more than 29,000 dollars in all. This way of looking at the matter is, I think, useful in considering the case generally, and particularly in connection with the liability of the special risk underwriters.

The liability of these special risk underwriters falls to be considered and determined before the liability of the other defendants is dealt with. Whatever the special risk underwriters are liable for diminishes the liability, or possible liability, of the other defendants. The contracts for the special risk insurances were made soon after the fire and before the vessel started on her voyage. The actual policies were issued considerably later. These policies are in all material respects of the same tenor, which may be summarized as follows: The assured were insured at and from New York for a total amount of 30,000 dollars on cargo's proportion of general average disbursements as per specification attached. The specification or average disbursements clause contained the following amongst other stipulations: " On . . . . . average disbursements applicable to cargo only. Interest admitted, amount at risk to be subsequently declared and valued. To pay the proportion attaching to any amount by which the property may be reduced in value owing to any subsequent accident, loss, damage, general average, salvage or charges, without benefit of any other insurance." By the proportion of average disbursements applicable to cargo was meant the disbursement made in connection with the first (fire) general average, and it was not suggested that the special risk policies extend to the second (collision) general average. The question, therefore, is for what part of the 24,862 dollars above mentioned are these defendants liable? The two main points at issue between the plaintiffs and these defendants were: (*a*) The plaintiffs contended that as between themselves and these defendants the 18,000 dollars realized from the cargo which was not carried on from New York did not come into the account. These defendants contended at first that they were entitled to credit for the whole amount. (*b*) These defendants submitted that the plaintiffs were not the persons who expended all the moneys claimed to be general average expenditure by ship; or, put another way, that the plaintiffs were not interested to the full amount of their claim. As to (*a*) I hold that the 18,000 dollars must come into the account for the following, amongst other, reasons: The cargo which went on from New York was reduced in value by the collision and second general average from about 19,000 dollars to nothing. Had there been no collision the full contribution recoverable from cargo in respect of the first general average (fire) would have been recovered. But if the cargo which went on to meet with the collision had not met with that collision and been thereby reduced in value, the cargo which remained at New York would not have been liable to make contribution up to 100 per cent., as it in fact did in the circumstances as altered by the collision. The contract sued upon being a contract of indemnity this must be taken into account and some credit given in respect of the contribution of 100 per cent. by the cargo worth about 18,000 dollars. The question is for how much? The figures finally contended for by Mr. Mitchison for the special risk underwriters were as follows: Deduct 18,000 from a figure of about 32,000 dollars appearing in the New York average statement and leave 14,000 as the sum lost by the collision for which his clients were responsible, subject to his other points. I incline to the view that this figure is approximately correct, but I am not sure precisely how a figure of about 19,000 dollars arrived at by the New York adjusters was arrived at, and whether this figure may not be more correct than the figure of 14,000 dollars. Accordingly, whilst deciding that the 18,000 dollars does come into the account, I leave for further settlement and determination the result in figures of this finding.

Since preparing this judgment there has been sent to me the report of a judgment of the United States Circuit Court of Appeals in the suit of *Armour & Co. and Others* v. *Green Star Steamship Co., Ld.* (1), against the present plaintiffs. By this judgment the judgment of Woolsey J. (2), which was referred to in the arguments of counsel in the present case, was reversed. Armour & Co. were owners of cargo on this voyage, and the action related to their rights against and in respect of the sum recovered from the owners of the other steamship, the *H. F. Alexander*, concerned in the collision. It may be—I do not know that it is so—that this reversal of Woolsey J.'s judgment may affect the figures in the present case and the figures relating to the first general average and the 18,000 dollars. At any rate I am fortified in the opinion I had already arrived at that the figures ought to be left in such a way that the parties could consider them afresh without any binding decision from me at the present stage on any question of amount. As to (*b*)—that is the contention as to the interest—this is really a question of fact. I have no doubt on the facts that the New York adjusters were correct in treating all the expenditure, the subject-matter of the claim, as made by or on behalf of the shipowners. Moreover, interest is admitted by the policies, and I think this meant interest in the whole of the expenditure, the subject-matter of the claim.

Whatever figure is finally arrived at as representing the liability of the special risk underwriters, be it 14,000 dollars

(1) (1931) 47 Fed. (2d) 874; 39 Ll. L. Rep. 199.

(2) (1930) 41 Fed. (2d) 812; 37 Ll. L. Rep. 178.

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or 19,000 dollars, or some intermediate or other sum, it is apparent that there remains of the plaintiffs' claim a balance of some 10,000 to 15,000 dollars which, on the basis I have adopted, is not recoverable from the special risk underwriters. The real question is whether the hull underwriters or the club are liable for this balance, which for convenience is hereafter described as "the balance." Counsel for the club argued somewhat faintly that the club might not be liable even if the hull underwriters were not liable. But the real strength of his argument went in support of the plaintiffs' contention that the hull underwriters are liable for the balance. If I were not of opinion that the hull underwriters are so liable I should certainly hold that the balance in those circumstances fell within the description of rule 2 (*c*) of the club's Indemnity Rules; that is to say, would be cargo's proportion of general average not otherwise recoverable. But I have arrived at the conclusion that the parties liable for the balance are the hull underwriters. This question to my mind presents very great difficulty and is also, in my view, one bare of authority. Its decision seems to me to depend upon the terms and meaning of s. 66, sub-s. 4, of the Marine Insurance Act, 1906. The sub-section is in the following terms: "Subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute." The rest of s. 66 has some bearing upon the matter. Sub-ss. 1 to 3 define or formulate the rules of general average as between the parties to the contract of affreightment. The rest of the sub-sections deal with the rights of the assured or liabilities of insurers. Sub-ss. 6 and 7 call for no comment. Sub-s. 5 deals with the case where the assured has not made an expenditure, but has paid or is liable to pay a contribution to another party's expenditure. That contribution he can recover from his insurer. Sub-s. 4 deals with two cases:

general average expenditure and general average sacrifice. The latter an assured can recover in full, as it was decided he could in *Dickenson* v. *Jardine.* (1) It was suggested by the plaintiffs that some small part of the so-called expenditure in the present case consisted of sacrifices. Counsel for the hull underwriters at once agreed that if this were so his clients were liable to that further extent, and no question as to that falls to be determined in this judgment. The real question was, and is, this: The plaintiffs and the club contended that the whole of the general average expenditure which had been incurred by the plaintiffs and was not met by contributions from the cargo represented and constituted the proportion of the loss which fell upon the plaintiffs, and that this proportion of the loss, or rather the balance after recovery from the special risk underwriters, was recoverable from the hull underwriters. On the other hand, Mr. Raeburn for the hull underwriters supported the view put forward by the New York adjusters that the proportion of the loss which fell upon the assured should, for the purpose of the hull insurance, be arrived at by assessing the values of the respective interests at the time when the expenditures were incurred for and on behalf of those interests. Moreover he strenuously contended that the New York adjusters had so dealt with the matter and had apportioned the sums now claimed as cargo's proportion of general average, and that their decision could not be reviewed. The decision of Gorell Barnes J. and of the Court of Appeal in *The Mary Thomas* (2) was relied upon in support of this contention and also as an authority directly and wholly opposed to the plaintiffs' claim upon the hull underwriters. As to the construction of s. 66, sub-s. 5, it was conceded by Mr. Raeburn that though this was a codifying Act it might alter the law—see *Polurrian Steamship Co., Ld.* v. *Young* (3)—but it was said that it required clear words to lead to the conclusion that the law was altered by the Act, and that so far from the words being clear in that direction they could themselves

(1) (1868) L. R. 3 C. P. 639.

(2) [1894] P. 108.

(3) [1915] 1 K. B. 922.

bear the construction which these defendants contended for and which they said was to the same effect as the law as laid down in *The Mary Thomas*. (1)

I will deal shortly with these various contentions, but before I do so it is to be observed that the rules laid down by s. 66 are laid down subject to any express provisions in the policy. There is no express provision in the policy now in question varying in favour of the insurers the rules of sub-s. 4. So far as there is express provision bearing on the matter in dispute it is contained in the provision making general average rules govern the rights and liabilities of the parties, and that provision, in my opinion, operates in favour of the assured in the present case.

As to the contention that the New York adjustment is binding and cannot be reviewed, it was held in *Harris* v. *Scaramanga* (2); *De Hart* v. *Compañia Anonima de Seguros "Aurora"* (3), and *The Mary Thomas* (1), that the foreign adjustments were binding, because the contracts provided that general average was payable according to (or per) foreign statements. Here there is no such stipulation but merely clause 9 of the Institute Clauses, and it seems clear from the language of Romer L.J. in *De Hart's* case (4), that had the Institute Clauses stood alone the foreign adjustments would not have been held to be binding. In my judgment there is nothing in the present case making the New York adjusters' views or statement binding upon the parties as to the effect of provisions of the York-Antwerp Rules or as to any matter now in controversy.

As to the more general application of the decision in the case of *The Mary Thomas* (1) I do not regard that decision as supporting these defendants' contention. It was a case where the foreign adjusters, whose adjustment both Gorell Barnes J. and the Court of Appeal held to be binding, had apportioned a certain amount to cargo as its contribution. The Dutch Courts had held that the shipowner could not recover that contribution, because his servant, the master

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(1) [1894] P. 108.

(2) (1872) L. R. 7 C. P. 481.

(3) [1903] 2 K. B. 503.

(4) Ibid. 503, 509.

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Roche J.

of the vessel, had been negligent. The English Courts held that the shipowners could not go behind the foreign adjustment and recover from their underwriters what they had failed to recover from the cargo owners. It is also to be observed that, as was there expressly stated by Lindley L.J., "Nothing turns on . . . . the York-Antwerp rules" (1), and I respectfully agree with Scrutton L.J.'s observation in *Chellew* v. *The Royal Commission on the Sugar Supply* (2), that Gorell Barnes J., in *The Mary Thomas* (3), was adopting the view that by English law, as apart from York-Antwerp Rules, the rights and liabilities of the parties were to be assessed as at the time when the expenditure was incurred rather than at the time when the adventure terminated. In these circumstances I feel that the decision in *The Mary Thomas* (3) not merely does not conclude this case, but affords me little, if any, guidance for its decision. Apart from *The Mary Thomas* (3) counsel were unable to refer me to any case before or after the date of the Act arising on facts and documents comparable with the facts and documents in the present case. Mr. Raeburn, for the hull underwriters, relied upon the fact that no case was to be found as an indication that such a claim was foreign to our law, and he suggested that the observations in *Chellew's* case (2) of Mr. Mackinnon (the arbitrator who stated the special case) and of Scrutton L.J. as to special insurance of the risk of loss of cargo indicate that the idea of an existence of a claim against ordinary underwriters on ship was also foreign to the minds of those high authorities on the law of marine insurance. I think the observation is not without weight, but the point never really arose for discussion, still less for determination, in *Chellew's* case (2), and I must now decide it for myself as a matter of first impression on the true effect and construction of sub-s. 4 of s. 66 of the Act in its application to the facts of this case. In my opinion, where the contract of insurance provides for the adjustment of general average according to York-Antwerp Rules, if the contract of affreightment so provides (as it did here), then, as between the insurer and the assured as well as between the parties to the adventure, the values which are alone material are the values at the termination of the adventure. It seems to me to be unnatural, if not impossible, to adopt and act upon values estimated or assessed at two different dates, the termination of the adventure and the incurring of the expenditure. The intention of an insurance contract in the present form seems to me to be that as regards general average the contract of affreightment and the contract of insurance shall in respect of the matters now in question proceed upon the same basis and principles. Accordingly, if a shipowner, being the assured under a policy in the present form, incurs expenditure for general average and the cargo's contribution falls short of what is hoped or expected by reason of the diminution or extinction of its value before the adventure terminates, then I think that loss falls into the category of the proportion of the loss which falls upon the assured, the shipowner, and is within the meaning of those words in the Marine Insurance Act, s. 66, sub-s. 4.

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(1) [1894] P. 108, 123.
(2) [1922] 1 K. B. 12, 20.
(3) [1894] P. 108.

I, therefore, hold that the plaintiffs are entitled to recover the balance of their claim against the defendants, the hull underwriters.

The result of these findings is that I give judgment for the plaintiffs against the defendants the London Assurance, the defendants the British Traders Insurance Company, Ld., and the defendant Arthur Henry Henderson, for their respective proportions of the divers sums or items which I have held above to be in principle the sums or items recoverable under the several policies. I give judgment for the defendant Association.

Judgment accordingly.

[It was further ordered that the judgment for the plaintiffs against the defendants, other than the defendant Association, should in default of agreement be with one set of costs, the apportionment of which among these defendants should be left to the Taxing Master, and that the judgment for the

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defendant Association should be with costs; And it was ordered with consent of all parties that they should have time to consider any question of amount with liberty to apply on some future day if desired.]

Solicitors for the plaintiffs: *Botterell & Roche, for Vaughan & Roche, Cardiff.*

Solicitors for the defendants the London Assurance: *Waltons & Co.*

Solicitors for the defendants the British Traders Insurance Company, Ld., and Mr. A. H. Henderson: *Waltons & Co.*

Solicitors for the United Kingdom Mutual Steamship Assurance Association, Ld.: *William A. Crump & Son.*

J. R.

1932
Nov. 2, 4, 9, 16.

SAUNDERS-JACOB *v.* YATES.

Landlord and Tenant—Agricultural Holding—Breaches of Tenancy Agreement—Holding let or treated as a Market Garden—Part of Holding—Agricultural Holdings Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 9), *ss.* 33, 48, 57.

By lease made in 1904 a private residence at Sunbury, Middlesex, with gardens, pleasure grounds, and meadow lands, being about 27 acres in all, was demised to the defendant's predecessor in title for twenty-eight years at a yearly rent of 126*l.* The lessee covenanted to keep the premises in repair and not to commit waste. He also covenanted not to occupy use or employ the premises for any trade except that of a nurseryman, market gardener, florist or farmer, without the written consent of the lessors. The lessee during the term ploughed up the grass land and cultivated it as a market garden. In 1924 the defendant, in whom the term was then vested, let the house and garden on a yearly tenancy, but continued to cultivate the rest of the land as a market garden. On the termination of the lease in 1931, the reversioners brought an action for damages for waste and for declarations that neither the demised premises nor any part thereof constituted a "holding" or "market garden" within the Agricultural Holdings Act, 1923:—

Held, that the premises, excluding the house and grounds let in 1924, constituted a separate holding under the Act; that they were let upon an agreement in writing made after January 1, 1896, which provided that the holding should "be let or treated as a market garden"; that it was therefore a "market garden" within ss. 48 and 57 of the Act, and that the claim failed.

ACTION before Macnaghten J. without a jury.

By a lease dated February 29, 1904, and made between the trustees of the Halliford Trust and one Scutt, florist, the trustees demised to him a dwelling-house known as Frith Grange, at Upper Halliford, Sunbury, in the county of Middlesex, with the cottages, stables, coachhouse, cowhouses, buildings, orchards, pleasure grounds, also gardens, paddocks and meadow ground adjoining thereto, and containing 27 acres and 23 perches, for a term of twenty-eight years from December 25, 1903, at the yearly rent of 126*l*. 7*s*. 6*d*., payable quarterly.

The lessee covenanted (inter alia) to keep the premises in good and tenantable repair during the said term. He further covenanted not to fell, cut down, or damage any timber or other trees, plants, vines or shrubs, to keep the pleasure grounds in good order, and to prune the vines, fruit trees and young plantations, and that he would not commit wilful or voluntary waste, spoil or destruction on, in or upon the premises, but would use the same in a good and husbandlike manner. The lessee also covenanted that he would at the expiration of the term yield up the premises to the lessors in good and tenantable repair.

There was a further covenant by the lessee not to place additional buildings on the premises other than glasshouses, greenhouses or other erections usually made or used by nurserymen, market gardeners, florists and farmers, and not to occupy, use or employ the premises for any trade, occupation or business whatsoever except that of a nurseryman, market gardener, florist or farmer without the consent in writing of the lessors.

The lessee entered into possession, and at some time during the currency of the lease ploughed up part of the grass land and cultivated it as a market garden. The lessors raised no objection at the time, and, as Macnaghten J. held in his judgment, no such objection could have prevailed having regard to the terms of the lease. In 1914 Scutt made over his interest to the Halliford Nurseries, Ld., a private company, in which the defendant held practically all the shares. Scutt also executed a declaration of trust in favour of the company. The company or the defendant then entered into possession and cultivated the land as a market garden. In 1924 the defendant let the house, Frith Grange, itself "with appurtenances" to one Hirst as tenant from year to year, and this tenancy continued until 1931. But this letting did not include the "gardens, paddocks and meadow ground," which were still cultivated as a market garden by the lessee.

The lease determined on December 25, 1931, when the reversion was vested in the trustees of the Halliford Trust, and the rights and liabilities of the lessee were vested in the defendant.

The plaintiff, who sued on behalf of himself and the other trustees of the Halliford Trust, alleged that the defendant or his predecessors had wrongfully and in breach of the above covenant committed waste by ploughing or digging up the permanent pasture upon the paddocks and meadow ground and converting them into arable land, and that the defendant had failed to maintain and keep the demised premises in good and tenantable repair. The plaintiff claimed a declaration that neither the demised premises nor any part thereof constituted a "holding" or a "market garden" within the Agricultural Holdings Act, 1923. He also claimed damages for the alleged breaches of covenant, and arrears of rent for one quarter. The arrears of rent were admitted by the defendant. The defendant in his defence pleaded that the premises constituted a "holding" and/or "market garden" within the Act of 1923. He also alleged that he had at the plaintiff's request on February 23, 1932, put forward his claims for compensation under the Agricultural Holdings Act, 1923, s. 16, sub-s. 2, and that an umpire had been agreed upon between them in respect of these claims and of the amount claimed by the plaintiff in respect of the alleged breaches of covenant: and that an arbitrator had been appointed under the Act at the request of the parties; and that the action was not maintainable.

W. Hanbury Aggs for the plaintiff. The defendant did not carry on the business of a market gardener referred to in the lease; his business was only that of a nurseryman. The premises did not constitute an agricultural holding, for the house was a suburban residence only, and the demised premises were therefore not a "holding" within the Agricultural Holdings Act, 1923, s. 33 (1); *In re Lancaster and Macnamara.* (2) Even if the premises are a "holding', within the scope of the Act, they are not a "market garden', within the definition clause, s. 57. There is no "agreement in writing that the holding shall be let or treated as a market garden," as required by s. 48 (3), nor has any order to that effect been made under s. 49.

[He referred also to *In re Russell and Harding's Arbitration* (4) and *In re Joel's Lease. Berwick* v. *Baird.* (5)]

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(1) The Agricultural Holdings Act, 1923 (13 & 14 Geo. 5, c. 9), s. 33, sub-s. 1, provides: "Where the land comprised in a contract of tenancy is not a holding within the meaning of this Act by reason only of the fact that the land so comprised includes land (hereinafter referred to as 'the non-statutory land') which, owing to the nature of the buildings thereon or the use to which it is put, would not, if it had been separately let, be a holding within the meaning of this Act, the provisions of this Act relating to compensation for improvements and disturbance shall, unless otherwise agreed in writing, apply to the part of the land exclusive of the non-statutory land as if that part were a separate holding."

(2) [1918] 2 K. B. 472.

(3) The Agricultural Holdings Act, 1923 (13 & 14 Geo. 5, c. 9), provides:—

Sect. 48, sub-s. 1: "In the case of a holding in respect of which it is agreed by an agreement in writing made on or after January 1, 1896, that the holding shall be let or treated as a market garden—(i) the provisions of this Act shall apply as if the improvements comprised in the Third Schedule to this Act were comprised in Part III. of the First Schedule to this Act."

Sub-s. 3: "Where the land to which such agreement relates, or so used and cultivated, consists of part of a holding only, this section shall apply as if that part were a separate holding."

Sect. 57: "(1) In this Act, unless the context otherwise requires .... 'Holding' does not include an allotment garden or include any land cultivated as a garden unless it is cultivated wholly or mainly for the purpose of the trade or business of market gardening, but, except as aforesaid, means any parcel of land held by a tenant, which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, and which is not let to the tenant during his continuance in any office, appointment, or employment held under the landlord:

. . . .

'Market garden' means a holding cultivated, wholly or mainly, for the purpose of the trade or business of market gardening."

(4) (1922) 128 L. T. 476; 39 Times L. R. 92.

(5) [1930] 2 Ch. 359.

As regards the terms of the lease, there is only a permissive covenant allowing the lessee to treat certain portions of the premises as a market garden, provided that he does not break the other covenants contained in the lease. The land was pastoral land, when let, and may or may not have been converted into agricultural land. But pastoral land cannot be turned into a " market garden " by breaking it up, and so claiming the protection of s. 57, sub-s. 1, of the Act.

Roland Burrows K.C. and *J. B. Lindon* for the defendant. The plaintiff's claim is inadmissible at common law, owing to the provisions of the Act of 1923, s. 16. It is true that in *Olive* v. *Paynter* (1) it was held that s. 16 does not bar claims arising from breaches of agreement of tenancy independently of the Act of 1923; but here the plaintiff is claiming a declaration. *Lowther* v. *Clifford* (2), which was followed in *Olive* v. *Paynter* (1), was upon the question of " outgoings " payable by the lessee. Apart from the point as to competency of action, the premises here constitute both a " holding " and a " market garden " within the Act. This is clear from the covenant in the lease that the lessee should not use the premises " for any trade occupation or business " except that of a " nurseryman, market gardener, florist or farmer " without the written consent of the lessors. The lease of February, 1904, was an agreement in writing relating to land, part of which the lessee was able to cultivate " as a market garden." The fact that only part of the holding could be so used makes no difference. For by s. 48, sub-s. 3, where the land so let consists of part of a holding only, the section applies as if that part were a separate holding.

Hanbury Aggs in reply. So far as the validity of the action is in question, I rely on *Olive* v. *Paynter* (1) and *Lowther* v. *Clifford*. (2) The object of the clause in the lease here as to cultivating the land as a market garden was to avoid the question of non-removable trade fixtures. But the clause was only permissive. The lessee has done nothing here sufficient to make the land a holding for use or cultivation as a market garden with the consent of the landlord: *In re Morse and Dixon.* (1)

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(1) [1932] 2 K. B. 666.

(2) [1927] 1 K. B. 130.

Cur. adv. vult.

Nov. 16. MACNAGHTEN J. [after stating the above facts, continued :] The action is brought by Mr. George Saunders-Jacob suing on behalf of the trustees of the Halliford Trust for a declaration that the demised premises were not a "market garden" within the meaning of the Agricultural Holdings Act, 1923, and for 31*l.* 10*s.* rent, and for damages for breach of covenant.

The defendant Mr. Yates by his defence admits that at the date of the determination of the lease the rights and liabilities of the lessee were vested in him. Mr. Scutt, the original lessee, never executed an assignment of the lease, but he held it in trust for the Halliford Nurseries, Ld., which is in substance Mr. Yates; and Mr. Yates, although the term has not in fact been assigned to him, accepts responsibility in the same manner as if the assignment had been made.

The defendant does not dispute that 31*l.* 10*s.* is due for rent. The assessment of damages for breach of covenant is a matter which must needs be referred. Accordingly at the trial before me the sole question which was contested between the parties was whether or no the demised land or any part of it was a "market garden" within the meaning of the Agricultural Holdings Act, 1923. The plaintiff maintains that although the land, with the exception of the dwelling-house, pleasure grounds and gardens, which Miss Hirst has occupied since 1924, has in fact been cultivated as a market garden, it was not a market garden within the meaning of the Agricultural Holdings Act, 1923, and therefore the claim which had been put forward by Mr. Yates against the trustees of the Halliford Trust for compensation under the provisions of that Act could not be sustained.

The question raised between the parties involves a consideration of the relevant provisions of the Agricultural Holdings Act, 1923. It is a matter for regret that that

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(1) (1817) 87 L. J. (K. B.) 1.

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Macnaghten J.

Act, intended to be the charter of agricultural and market garden tenants, is expressed in language which is difficult even for a trained lawyer to understand.

Sect. 57 of the Act defines a " market garden " as a holding cultivated wholly or mainly for the purpose of the trade or business of market gardening. A " holding " by the same section is defined as, among other things, a parcel of land held by a tenant which is either wholly or in part cultivated as a market garden. Those definitions have to be read in connection with s. 48, which restricts the right of the tenant of a market garden to compensation under the Act to " the case of a holding in respect of which it is agreed by an agreement in writing made on or after the first day of January, 1896, that the holding shall be let or treated as a market garden." Sub-s. 3 of that section provides : " Where the land to which such agreement relates, or so used and cultivated, consists of part of a holding only, this section shall apply as if that part were a separate holding." The question therefore at issue between the parties is whether the lease of February 29, 1904, is " an agreement made in writing that the holding shall be let or treated as a market garden." Before I deal with that point let me refer again to s. 48, sub-s. 3, to dispose of a controversy whether the whole of the premises demised by the lease of 1904 was a market garden. Frith Grange is obviously a private dwelling-house. In size, appearance, style and the nature of the accommodation within it, it is just an ordinary suburban residence with a garden and grounds described in the lease as " pleasure grounds." That portion of the demised premises which was let to Miss Hirst in 1924 apparently always had that character. It had that character at the date of the lease, and obviously it is not a market garden. Therefore these demised premises are premises to which s. 48, sub-s. 3, would be applicable, if indeed the premises come within that section at all, because only part of the land to which the lease of 1904 relates is used as a market garden. The part that is so used has to be treated as a separate holding within the meaning of the Agricultural

Holdings Act, 1923. But did the lease provide that the demised premises, excluding the portion that was let in 1924 to Miss Hirst, should be let or treated as a market garden? It is quite clear that it was pasture land when it was let, and that the lessee had the right, if he was minded so to do, to cultivate it as a market garden. It was not disputed that, if the lessee had covenanted that he would cultivate it as a market garden, it would come within the provisions of s. 48; but it was suggested that as the lessee merely had a permissive right to cultivate it as a market garden and was not bound so to cultivate it, it could not be said that the lease of 1904 was an agreement in writing that the holding should be "let or treated as a market garden." I think that argument is not well founded. If a building is let as a private residence—which was the provision contained in Miss Hirst's agreement—or if it be let as a shop or a factory, the meaning of that expression is that the building is to be used for the purpose of a private residence or a shop or a factory. I think the expression "the holding shall be let as a market garden" means a holding let "for the purpose of" a market garden. This land was certainly let for the purpose of a market garden, if the lessee chose so to cultivate it; he did choose to do so, and therefore I think the lease was an agreement in writing, made after the specified date, that the holding, excluding the part that Miss Hirst occupied after 1924, should be let as a market garden. In my view, the claim of the plaintiffs for a declaration that it was not a holding within the meaning of the Agricultural Holdings Act, 1923, fails. The claim for damages for breach of covenant in respect of that part of the demised premises which was let as a private residence to Miss Hirst will be referred.

Judgment for defendant.

Solicitors for plaintiff: *Wm. Easton & Sons.*
Solicitors for defendant: *Greenwell & Co.*

F. P. F.

1932
Dec. 7, 8, 16.

SHUTTLEWORTH *v.* LEEDS GREYHOUND ASSOCIATION, LIMITED, AND OTHERS.

Gaming—Betting—"Place" kept for Money being received as consideration for Promise to Pay on Event relating to Race—Totalisator—Greyhound Racecourse—Betting Act, 1853 (16 *&* 17 *Vict. c.* 119), *s.* 1.

Sect. 1 of the Betting Act, 1853, after providing that no house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or certain other specified persons, betting with persons resorting thereto, continues: " or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise . . . ."

The words " such owner, occupier, keeper, or person as aforesaid " in the latter part of the section are not to be read as limited to the class of persons who come within the ambit of the earlier part of the section—namely, persons who themselves are parties to bets or to transactions of the nature of bets. A person, therefore, such as the proprietor of a totalisator on a greyhound racecourse, who merely provides facilities for other persons to bet, and is not himself a party to any bet, may be guilty of an offence under the latter part of the section.

The respondent Association were the occupiers of a totalisator within the inclosure of their greyhound racecourse. The totalisator was a one-storey wooden building equipped with windows for paying and receiving money, and an indicator forming a separate part—both within the racecourse. Access to both (dependent on access being obtained by payment to the racecourse) was by payment and receipt of a ticket. In the totalisator were windows at which 10*s.* tickets and 2*s.* tickets were sold, and three or four paying-out windows. Tickets were bought at the respective windows with a number indicating the number on the race-card of a dog running in the race, the purchaser of the ticket stating the number of the dog selected before purchasing his ticket. After the race the stakes received, after certain deductions, were divided in certain proportions among the persons who held tickets bearing the numbers of the winning and second and third dogs:—

Held, that the respondent Association had been guilty of an offence under the latter part of s. 1 of the Betting Act, 1853.

Powell v. *Kempton Park Racecourse Co.* [1899] A. C. 143 and *Reg.* v. *Stoddart* [1901] 1 Q. B. 177 considered.

Reg. v. *Hobbs* [1898] 2 Q. B. 647 distinguished.

Attorney-General v. *Luncheon and Sports Club, Ld.* [1929] A. C. 400 applied.

Strathern v. *Scottish Greyhound Racing Co.* 1930 S. C. (J.) 24 not followed.

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SHUTTLEWORTH v. LEEDS GREYHOUND ASSOCIATION.

CASE stated by Leeds stipendiary magistrate.

The first of two summonses charged the respondents, the Leeds Greyhound Association, Ld., upon an information laid by the appellant that "being the occupiers of a wooden building in the enclosure at the Leeds Greyhound Racecourse at Elland Road in the City of Leeds . . . . on the 2nd March, 1932, and on other days they unlawfully knowingly and wilfully did permit the said building to be used by other persons for the purpose of money being received on behalf of such other persons as the consideration for an undertaking to pay thereafter money on a contingency relating to a greyhound race contrary to sections 1 and 3 of the Betting Act, 1853." The respondents, Sutcliffe and Barker, servants of the respondent Association, were charged with aiding and abetting the commission of that offence. A second summons was in similar terms, except that it varied the alleged offence by stating that the respondent Association, on the said days, "unlawfully knowingly and wilfully did permit the said building to be used by other persons for the purpose of money being received on behalf of such other persons as the consideration for securing the paying by another person or other persons of money on a contingency relating to a greyhound race contrary to the said sections. . . . ." The respondents, Sutcliffe and Barker, were also charged with aiding and abetting the commission of that offence.

The facts found by the magistrate were as follows :—

(1.) The respondent Association were on the days in question the occupiers of a totalisator within the inclosure of their Leeds Greyhound Racecourse at Elland Road in the City of Leeds. The totalisator was a one-storied wooden building equipped with windows for paying and receiving money, and an indicator forming a separate part, both building and indicator being within the Leeds greyhound racecourse. Access to both (dependent on access being obtained to the racecourse) was by payment and receipt of a ticket. Access to the racecourse was given on payment of a separate sum for admission. In the totalisator were windows at which 10*s*. tickets and 2*s*. tickets were sold, and windows for obtaining change. There were three or four paying-out windows. Tickets were bought at the respective windows with a number indicating the number of the dog on the race-card running in the race, the purchaser of the ticket stating the number of the dog selected before purchasing his ticket. On all the tickets were printed the words, "The Leeds Greyhound Association." The indicator had dials showing winning pools, place pools, and a double event pool, and a dial indicating the units invested on each dog, changing from time to time as money was invested. The odds were not shown, but at the end of each race the odds payable in respect of the winning dog and placed dogs were "slotted" in the indicator.

(2.) The magistrate was satisfied that, if any offence was committed by the respondent Association, the respondents, Sutcliffe and Barker, aided and abetted the commission of that offence.

(3.) The totalisator in operation was a "Julius All Electric Totalisator," the property of Totalisators, Ld. It was worked by the said Totalisators, Ld., through a company named Tote Operators, Ld., under licence of the respondent Association by virtue of an agreement entered into between the Association and Totalisators, Ld. The licensees covenanted to pay to the Association the following sums, that is to say: (*a*) a sum equal to 2½ per cent. of the amount of the turnover passing through the totalisator weekly up to 4000*l*. of turnover; (*b*) a sum equal to 2¾ per cent. of the amount of the turnover passing through the totalisator weekly in excess of that sum and up to 6000*l*. of turnover; and (*c*) a sum equal to 3 per cent. of the amount of the turnover passing through the totalisator in excess of 6000*l*. of turnover. It was further provided that the licensees should be entitled to deduct and retain out of the turnover moneys passing through the totalisator a sum of not less than 10 per cent. of such turnover, subject to certain immaterial conditions.

(4.) It was admitted for the purpose of this case that the respondent Association were occupiers of the totalisator.

(5.) There was no evidence to show that, apart from the above percentages, the respondent Association, or Totalisators, Ld., or Tote Operators, Ld., received any money in respect of the betting on the totalisator. The magistrate was of opinion that their receipt of percentages was secured only by the moneys that passed through the totalisator, and that the payment on winning tickets was secured by this means alone. The bets being by deposit, no question of any guarantee by the respondent Association arose. If any false coin was accepted by the totalisator there was no guarantee by those operating it to reimburse the betting fund by that amount.

The magistrate found that it was a condition precedent to the application of s. 1 of the Betting Act, 1853, that the person charged was primarily engaged in betting with the persons resorting to the premises owned, occupied, or kept by him, or was conducting something in the nature of a betting business, and, while he was of opinion that the respondent Association had permitted the keeping of a "place" within the meaning of the section, it was not a place kept within the mischief of the section, and he, therefore, dismissed both summonses.

The appellant being dissatisfied with this decision on the ground that it was erroneous in point of law, the magistrate states this Case for the opinion of the Court thereon.

Comyns Carr K.C. and *Gilbert Beyfus* for the appellant. The decision of the magistrate was wrong. If he were right, a totalisator has always been legal on a racecourse on which horse races take place, and the Racecourse Betting Act, 1928 (which was passed "to legalise the use of totalisators on certain racecourses . . . . on which horse races . . . . take place"), was wholly unnecessary and was enacted under a complete misapprehension of the law as it then stood.

On the authorities the respondents should have been convicted. *Reg.* v. *Hobbs* (1), the case of a sweepstake, is distinguishable, the ground of the decision being that the event or contingency in respect of which the money was to be paid was not the horse race, but the drawing of the horses' names. (1) In *Powell* v. *Kempton Park Racecourse Co.* (2), it was held that an inclosure on a racecourse where ordinary peripatetic bookmakers carried on their business during race-meetings was not a "place opened, kept, or used" for the purposes prohibited by the Betting Act, 1853, s. 1, but that case did not decide that for "an occupier as aforesaid" to be guilty of an offence under the latter part of the section he must bet, or be willing to bet, with persons resorting to the premises. When Lord Halsbury L.C. would seem to be expressing that opinion (3), he is really referring only to the first part of the section. *Reg.* v. *Hobbs* (4) was distinguished in *Reg.* v. *Stoddart* (5), where the Court definitely negatived the suggestion that, for there to be an offence under the later part of s. 1, the defendant must have himself betted, or entered into transactions of the nature of bets, with the persons resorting to his premises: see also *Hawke* v. *Mackenzie* (6); *Peers* v. *Caldwell* (7); *Yeudall* v. *M'Quilkie* (8); *Richards* v. *Price* (9); *Everett* v. *Shand.* (10) The magistrate relied on *Strathern* v. *Scottish Greyhound Racing Co.* (11), but that decision, which in any case is not binding on this Court, is distinguishable from the present case, because it was based on an interpretation of the first part of s. 1, and the second part, with which the Court is concerned here, was not dealt with at all. If that is not so, then the Court of Justiciary treated both parts of the section as requiring betting between the defendant and the persons resorting for there to be an offence, and that is inconsistent with the English cases to which reference has been made. *Attorney-General* v. *Luncheon and Sports Club* (12), has no application to a case under the second part of s. 1. Its effect is merely to prevent the respondents being charged under the first part of the section.

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(1) [1898] 2 Q. B. 647.

(1) [1898] 2 Q. B. 657.
(2) [1899] A. C. 143.
(3) Ibid. 161.
(4) [1898] 2 Q. B. 647.
(5) [1901] 1 Q. B. 177, 184, 186.
(6) [1902] 2 K. B. 225.
(7) [1916] 1 K. B. 371.
(8) 1928 S. C. (J.) 54.
(9) [1931] 2 K. B. 204.
(10) [1931] 2 K. B. 522.
(11) 1930 S. C. (J.) 24.
(12) [1929] A. C. 400.

The fact that, as was the case here, the money to be paid on the event came solely from the bettors and was not provided by the occupier of the premises does not prevent the occupier being guilty of an offence under the latter part of the section. Nor does it matter whether or not the property in the money paid had previously passed to the occupier.

Sir William Jowitt K.C. and *Foot* for the respondents. The Betting Act, 1853, is expressed to be "an Act for the Suppression of Betting Houses." The preamble refers to gaming by the opening of betting houses "and the receiving of money in advance by the . . . . occupiers of such houses . . . ., or by other persons acting on their behalf, on their promises to pay money on events of horse races and the like contingencies." Throughout the whole of the Act it is made abundantly clear that the evil which the Legislature sought to prevent was betting or wagering by persons resorting to a house with the occupier, etc., thereof. The fact that the words "bet" or "betting" are not used in the latter part of s. 1 of the Act is probably due to the Legislature being reluctant to confine itself to betting pure and simple and not to cover transactions analogous to betting. It is for the Court to interpret the Act of 1853, and not for Parliament to do so, and, therefore, what was in the mind of Parliament when it passed the Racecourse Betting Act, 1928, is quite immaterial, especially as that Act was passed before the decision in *Attorney-General* v. *Luncheon and Sports Club* (1), at a time when it might have been thought that the proprietor of a totalisator betted as a bookmaker with the persons who backed horses through the totalisator.

The contention that, for there to be an offence under any limb of s. 1 of the Betting Act, 1853, there must be, between the occupier of the house and the persons resorting to it, transactions which are either bets in the ordinary sense of the word or are of the nature of bets receives support from *Powell* v. *Kempton Park Racecourse Co.* (2) Para. 3 of the statement of claim in that case (3) makes it plain that the allegation that the bookmakers' inclosure was opened and kept by the defendant company for the purpose of money being received by or on behalf of persons using the same as or for the consideration for a promise to pay money on the event of a horse race was before the House of Lords which, therefore, had to consider the latter, as well as the first, limb of the section. The enactment "prohibits opening a house, etc., for the purpose of the owner or occupier betting with persons resorting to the house so opened": per Lord Halsbury L.C. (1) Later (2), Lord Halsbury says: "The second part of the section is in strict accordance with what I have suggested as the meaning of the statute. . . . . It seems to me clear that the thing against which the enactment is levelled is any place used in the sense I have explained. There must be a business conducted, and there must be an owner, occupier, manager, keeper, or some person who . . . . is of the same genus as the owner, keeper, or occupier, who bets or is willing to bet with the persons who resort to his house, room, or other place." Moreover, "the Act is directed not against betting, but against bookmakers": per Lord Hobhouse and Lord James of Hereford, in *Powell* v. *Kempton Park Racecourse Co.* (3), and the proprietors of a totalisator are not bookmakers: *Attorney-General* v. *Luncheon and Sports Club, Ld.* (4) The purposes prohibited by the section are "(1.) using a house, etc., for the purpose of betting with persons resorting thereto, and (2.) receiving deposits on bets": per Lord Davey in *Powell* v. *Kempton Park Racecourse Co.* (5) Both the first and the second limbs of the section are to be interpreted in the light of the preamble to the Act, and, with regard to both of them, for there to be an offence, there must be something in the nature of betting to which the owner, occupier, or keeper of the place is one of the parties.

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(1) [1929] A. C. 400.

(2) [1899] A. C. 143.

(3) Ibid. 144.

The present case is precisely covered by *Reg.* v. *Hobbs* (6), the effect of which is that a person who merely holds stakes and secures that the money, after some deduction for expenses or otherwise, shall be divided in accordance with the event of a race does not commit any offence under the second limb of the section, because the money is not received by or on behalf of him within the meaning of the section. The proprietors of the totalisator in the present case were mere stakeholders.

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(1) [1899] A. C. 159.
(2) Ibid. 161.
(3) Ibid. 181, 182, 196.
(4) [1929] A. C. 400.
(5) [1899] A. C. 186.
(6) [1898] 2 Q. B. 647.

The Betting Act, 1853, does not forbid persons using a place by going there and meeting and betting with each other. Nor does it forbid keeping a place where persons may meet and bet with each other: per Channell J. in *Brown* v. *Patch* (1); *Reg.* v. *Stoddart* (2); *Peers* v. *Caldwell* (3); and *Suttle* v. *Cresswell* (4) are distinguishable, inasmuch as the persons prosecuted in those cases, unlike the present respondents, stood to win or lose according to the result of a race. On the other hand, *Strathern* v. *Scottish Greyhound Racing Co.* (5) dealt with both parts of the section, and the decision should, it is submitted, receive the approval of the Court in the present case.

The " promise to pay " mentioned in s. 1 must be a promise by the occupier of the house, etc., to pay out of his own pocket. Here the payment is made out of a fund provided, not by the respondent association, but by the other bettors. " On any event or contingency " implies an event or contingency common to both the occupier and the persons resorting. Here the position of the respondent association is unaffected by which dog wins a race.

Comyns Carr K.C. in reply. Sect. 6 of the Betting Act, 1853, specifically excludes a stakeholder from the operation of the Act. If, in the absence of that section, a stakeholder would not have committed any offence under s. 1, it was unnecessary to insert s. 6 in the Act and it was, therefore, pure surplusage. Such a view is untenable.

Sir William Jowitt K.C. Sect. 6 was inserted ex abundanti cautela.

Cur. adv. vult.

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(1) [1899] 1 Q. B. 892, 898.
(2) [1901] 1 Q. B. 177.
(3) [1916] 1 K. B. 371.
(4) [1926] 1 K. B. 264.
(5) 1930 S. C. (J.) 24.

Dec. 16. LORD HEWART C.J. read the judgment of the Court (LORD HEWART C.J., AVORY and BRANSON JJ.) which, after a statement of the Case, as set out above, was as follows: Both of these summonses were for permitting other persons to use the place for the prohibited purposes, but we are asked by the respondents to treat the respondent Association as being the sole persons concerned in the conduct of the totalisator business on their racecourse, inasmuch as it is expressly admitted that no distinction is to be drawn between the Association and their licensees.

On the facts found the learned stipendiary magistrate held that no offence against s. 1 of the Betting Act, 1853, had been committed by the respondents, and the question is whether he was correct in so holding. The answer to that question is best arrived at by turning at once to the Act itself and then examining the cases in which the construction to be placed upon it has been discussed.

The language of the first section of the Act is somewhat involved by reason of the anxiety of the draftsman to guard against evasions of it. It will tend to clearness if it is dissected and words not applicable to the present case are omitted. So treated, the section reads as follows: No place shall be kept (1.) for the purpose of the occupier thereof betting with persons resorting thereto; or (2.) for the purpose of any money or valuable thing being received by or on behalf of such occupier as aforesaid (*a*) as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any race, or (*b*) as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid.

The first question of construction which is raised is as to the effect of the words, "such occupier as aforesaid." The learned magistrate adopted the contention put forward on behalf of the respondents that these words qualified "the class of persons amenable to the provisions of the second part of section 1 as being persons within the ambit of the first part of the section, such persons not being persons opening, keeping, or using a place simpliciter, but doing so for the purpose of betting with persons resorting thereto or conducting some kind of a betting business." We do not agree with this view. In our opinion the words are used in order to avoid repeating at length the words in the first part of the section, "owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof." The first part of the section specifies (*a*) the place, (*b*) the persons who, in a variety of capacities, may be using it, and (*c*) a purpose for which it may not be used. The second part—introduced by the alternative "or"—specifies the same variety of capacities in which a person may be using the place, but different purposes for which the place may not be used. And the section concludes by declaring that a place kept for the aforesaid purposes or any of them shall be a public nuisance.

This is the view expressed by Lord Halsbury in *Powell* v. *Kempton Park Racecourse Co.* (1), when he is dealing with the second part of the section. The passage to which we refer is the following: "The second part of the section is in strict accordance with what I have suggested as the meaning of the statute. It assumes a place or establishment for receiving money or some valuable thing being received by or on behalf of an owner, occupier, keeper, or person; here the statute uses the words 'as aforesaid,' that is 'person using the same,' for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or other race, fight, game, sport, or exercise."

Such being, in our opinion, the true construction of the section, we proceed to consider, first, whether the facts found in the present case bring the respondents within its ambit;

(1) [1899] A. C. 143, 161.

and, secondly, whether there is any authority for holding that the construction we have adopted is incorrect.

It is not, and could not be, contended that the respondents have committed any offence against that part of the section which is marked (1.) in our dissection of it. This result follows from the decision of the House of Lords in *Attorney-General* v. *Luncheon and Sports Club, Ld.* (1), where it was held that the operators of a totalisator do not make bets or wagers with persons who stake their money through the totalisator. The operators of a totalisator, however, do receive money, and if they receive it as the consideration for any promise, express or implied, to pay any money thereafter to any one on any event or contingency of or relating to a race the place which they keep for the purpose of so receiving the money is, in our opinion, within the ordinary meaning of the language used in that part of the section distinguished above as (2.) (*a*). The money paid to the operators of a totalisator is not a gift. They are entitled, in the ordinary course of the events contemplated, alike by themselves and by those who pay their money to them, to put into their own pockets a percentage of each payment they receive. The consideration for the receipt by them of the money paid is their undertaking or promise that they will thereafter pay money to such person or persons as the event of the race shall entitle to receive it.

Unless, therefore, any limitation is to be placed on the plain language of the section, the facts establish an offence against that part of it which we have distinguished as (2.) (*a*). The respondents contend that certain authoritative decisions of the Courts have established that the language of the section must be read in a limited sense, and that no part of it applies to any place kept or used by a person who does not himself enter into transactions which are either bets in the ordinary sense of that word or of the nature of bets. The first case cited in support of this contention is *Powell* v. *Kempton Park Racecourse Co.* (2), and reliance is placed in particular on certain passages in the opinion of the late Lord Halsbury.

(1) [1929] A. C. 400.

(2) [1899] A. C. 143.

It is essential in approaching the consideration of this case to bear in mind what exactly was the point which arose for decision. The action was brought for the express purpose of testing the decision in *Hawke* v. *Dunn* (1), in which five judges had held in similar circumstances that there had been an infringement of the first part of s. 1 of the Betting Act, 1853, without any reference to the second part. The question was whether the inclosure on the racecourse frequented by bookmakers could properly be said to be " used by " them for the purpose of betting with persons resorting thereto. The decision was concerned, therefore, solely with that part of the section distinguished above as (1.), and nothing turned upon the construction of those parts distinguished as (2.) (*a*) and (*b*). It is to be observed that in his dissection of s. 1 the noble and learned Lord stopped short at the end of that part of it which we have called (1.). It is true that he refers later in his opinion to the second part of the section in the passage which we have quoted above. Having made this reference to the second part of the section he continues (2) : " It seems to me clear that the thing against which the enactment is levelled is any place used in the sense I have explained. There must be a business conducted, and there must be an owner, occupier, manager, keeper, or some person who, if these designations do not apply to him, must nevertheless be some other person who is analogous to and is of the same genus as the owner, keeper, or occupier, who bets or is willing to bet with the persons who resort to his house, room, or other place. In this view it is not an offence under this Act of Parliament to allow persons to assemble for the purpose of betting with each other ; there is, upon this hypothesis, no business being conducted at all. The different betting people, or each individual bettor, is conducting his own business, and doing it in a house used indeed, but only used, just as he might do it on the racecourse or on the high road. There is no betting establishment at all, and there is no keeper of one." If it were certain that, in the paragraph just quoted, Lord Halsbury was referring to the section as a whole, this Court would, as

(1) [1897] 1 Q. B. 579. (2) [1899] A. C. 161.

in duty bound, bow to his authority. But an examination of the language of the paragraph has convinced us that he was not. He speaks of the necessity of the occupier being one who is ready and willing to make a bet with persons resorting to the place, a necessity which would clearly exist in cases to be brought within (1.) and which might possibly exist in cases to be brought within (2.) (*a*). But such a necessity cannot exist in the cases contemplated in (2.) (*b*), for a bet with a person resorting to the place cannot result in a payment becoming due from some other person. It follows that, in the paragraph in question, Lord Halsbury has left the consideration of the latter part of s. 1 and gone back to that part which alone was material to his decision. None of the other noble and learned Lords who delivered opinions in *Powell* v. *Kempton Park Racecourse Co.* (1), dealt with this point at all, and we are, therefore, of opinion that that case is no authority for placing any limitation on the plain words of the second part of the section.

The next case relied on by the respondents is *Reg.* v. *Hobbs.* (2) This was a decision of the Court for Crown Cases Reserved on a case stated by Hawkins J. From the case it appeared that Hobbs, a publican, had, for the amusement of his customers, organized a sweepstake on terms which resulted, and were intended to result, in his receiving nothing but his expenses in connection therewith, and on which he entered into no contractual relationship with those participating in the sweepstake. On these facts it was held that Hobbs had not used his house for the purpose of receiving any money as or for the consideration of any promise to pay upon the event of a race: first, because it did not appear that he had received the money as or for the consideration of any promise to pay at all; and, secondly, because the event was not the result of the race but the drawing of the sweepstake. In our view *Reg.* v. *Hobbs* (2) was decided on the particular facts of the case, which differ from those of the present case in two most material respects. In the present case the respondents did receive money as or for the

(1) [1899] A. C. 143.

(2) [1898] 2 Q. B. 647.

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consideration of a promise to pay, and to pay upon the event of a race. Sir William Jowitt argued for the respondents that the decision of the Court in *Reg.* v. *Hobbs* (1) could be explained only on the assumption that the Court had placed on the words in sub-division (2.) (*a*) of s. 1 the limitation that the person receiving the money must have received it in pursuance of a bet made with himself.

If this view were correct, as in our opinion it is not, then Hobbs's case would be in conflict with the later decision of the Court for Crown Cases Reserved in *Reg.* v. *Stoddart.* (2) In that case there was, it is true, the fact that Stoddart had made a contract which some members of the Court thought was indistinguishable from a bet. But the distinction drawn by all the judges was not that Stoddart had made a bet whereas Hobbs had not, but that Stoddart had made a contract and Hobbs had not. The judgment of Wills J. is a clear authority that the words of the section are to be construed in their natural and ordinary sense and not to be limited in the way suggested. Channell J., who tried the case of *Reg.* v. *Stoddart* (2) and directed a verdict of guilty, expressed his agreement with the views of the Scottish Court in *Hart* v. *Hay Nisbet & Co., Ld.* (3) In that case the Lord Justice-General (4) used the following words after the decision in *Reg.* v. *Hobbs* (1) had been quoted and relied upon on behalf of the respondents : " Section 1 of that Act deals with two distinct offences—it forbids opening, keeping, or using any house, office, room, or other place (1.) for the purpose of the owner, occupier, keeper thereof, or any person using the same, or any person procured or employed by him or acting on his behalf, or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto ; (2.) or for the purpose of any money or valuable thing being received by or on behalf of any such person in consideration (*a*) for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race or other race, fight, game, sport, or exercise, or (*b*) for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency." And a little later the Lord Justice-General added "The things described in the section were done, whether they are called betting or not, and therefore it appears to me that the question put in the case should be answered in the affirmative." It is instructive also to notice that Mr. Joseph Walton Q.C., as he then was, having successfully argued the case for the respondents in *Powell* v. *Kempton Park Racecourse Co., Ld.* (1), in the House of Lords, did not see fit to quote or to rely on that decision as having any bearing in support of his argument for the defendant in *Reg.* v. *Stoddart.* (2)

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(1) [1898] 2 Q. B. 647.

(2) [1901] 1 Q. B. 177.

(3) (1900) 37 Sc. L. R. 652.

(4) Ibid. 655.

The last case relied on by the respondents is *Strathern* v. *Scottish Greyhound Racing Co.*, (3) It is not a decision which is binding on this Court, but it is needless to say that we should not differ from it without the most anxious consideration. Having given it that consideration we observe two things: (1.) that two members of the Court arrived at the decision given with obvious reluctance and only because they felt themselves bound by authority, and (2.) that the authority by which they felt themselves bound is the opinion of Lord Halsbury in *Powell* v. *Kempton Park Racecourse Co., Ld.* (1), which for reasons already given, we think, was not dealing with the part of s. 1 of the Act of 1853 material to the case before us.

For these reasons we are of opinion that the respondents committed the offence with which they were charged under the first of the two summonses. We are confirmed in this opinion by the argument of Mr. Comyns Carr for the appellants based on s. 6 of the Betting Act, 1853. On the construction which we have adopted, s. 6 is necessary to prevent a mere stakeholder from coming within the Act. If the other construction were the correct one, s. 6 would be quite unnecessary and could only have been inserted ex abundanti cautela.

(1) [1899] A. C. 143.

(2) [1901] 1 Q. B. 177.

(3) 1930 S. C. (J.) 24.

Having come to this decision upon the first summons we do not consider it necessary to express any opinion as to the second. The case must go back to the learned magistrate with the direction that the respondents were guilty of the charge made against them in the first summons.

Appeal allowed.

Solicitors for appellant: *Edmond O'Connor & Co.*
Solicitors for respondents: *Garland Wells & Co.*

G. F. L. B.

HENNELL *v.* COMMISSIONERS OF INLAND REVENUE.

C. A.
1932
Nov. 11.

Revenue—Stamp Duty—Deed of Covenant to secure fixed Monthly Sums—Payment "at stated periods"—Annuity—"Bond, Covenant, or Instrument"—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *Sch. I.*

By Sch. I. to the Stamp Act, 1891, a bond, covenant, or instrument of any kind whatsoever, being the only principal or primary security for an annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity), or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack, is chargeable, if for a definite and certain period, so that the total amount to be ultimately payable can be ascertained, with the same ad valorem duty as a bond or covenant for such total amount; if for the term of life or any other indefinite period with a duty of 2*s.* 6*d.* for every 5*l.*, and also for any fractional part of 5*l.*, of the annuity or sum periodically payable.

By a deed of covenant dated March 31, 1931, a father in consideration of natural love and affection covenanted to pay to his son during their joint lives "the sum of 21*l.* 13*s.* 4*d.* (herein referred to as 'the monthly sum') on the 1st day of every calendar month commencing on the 1st day of April, 1931":—

Held (affirming the decision of Rowlatt J.), that the deed was a security for an indefinite period for a sum of money at monthly periods, and not for an annuity or yearly sum payable by monthly instalments, and was therefore liable to ad valorem duty upon the sum agreed to be paid monthly, and not upon the total amount of such monthly payments for a year.

Clifford v. *Inland Revenue Commissioners* [1896] 2 Q. B. 187 approved and followed.

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HENNELL v. INLAND REVENUE COMMISSIONERS.

APPEAL from a decision of Rowlatt J. on a Case stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891.

On July 17, 1931, an instrument was presented on behalf of the appellant by Messrs. J. C. Fox, Gamble & Son, his solicitors, to the Commissioners of Inland Revenue under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable.

The instrument was a deed of covenant entered into by the appellant with his son Ian Alexander Hennell whereby in consideration of natural love and affection the appellant covenanted to pay to his said son during their joint lives the sum of 21*l*. 13*s*. 4*d*. on the first day of every calendar month commencing on April 1, 1931. The instrument was in the following terms :—

" This deed of covenant made the 31st day of March 1931 Between Bernard Hennell of 'Holmesdale' Putney Heath Lane Putney in the County of London chartered accountant of the one part and Ian Alexander Hennell of 'Holmesdale' Putney Heath Lane Putney aforesaid of the other part Whereas the said Bernard Hennell being desirous of making provision for his son the said Ian Alexander Hennell has agreed to pay to him during the joint lives of the parties hereto the sum of 21*l*. 13*s*. 4*d*. per month and to enter into such covenant as is hereinafter contained Now this deed witnesseth that in pursuance of the said agreement and in consideration of his natural love and affection for the said Ian Alexander Hennell he the said Bernard Hennell hereby covenants with the said Ian Alexander Hennell during the joint lives of the parties hereto to pay to the said Ian Alexander Hennell the sum of 21*l*. 13*s*. 4*d*. (hereinafter referred to as 'the monthly sum') on the 1st day of every calendar month commencing on the 1st day of April 1931 Provided that upon any act or event being done or happening whereby the monthly sum or any part thereof would if belonging to the said Ian Alexander Hennell become vested in or charged in favour of any other person or any corporation the monthly sum shall cease to be paid to the said Ian Alexander Hennell and shall be paid to a trustee to be nominated by the said Bernard Hennell and the said trustee shall apply the monthly sum as in his discretion he shall think fit for the benefit of the said Ian Alexander Hennell."

It was admitted by the appellant that the instrument was chargeable to duty by reference to the head of charge in Sch. I. to the Stamp Act, 1891, of "Bond, Covenant, or Instrument of any kind whatsoever."

The Commissioners of Inland Revenue were of opinion that the instrument was a security for an annuity and was the only security for that annuity; that the amount of the annuity was 260*l.*, and that as the annuity was payable for the term of life the instrument was liable to duty at the rate of 2*s.* 6*d.* for every 5*l.* and for any fractional part of 5*l.* of the annuity of 260*l.*—namely, 6*l.* 10*s.*

The appellant contended that the instrument was the only security not for an annuity but for a sum or sums of money at stated periods for the term of life or other indefinite period; that the sum periodically payable was the sum of 21*l.* 13*s.* 4*d.* payable monthly on the first day of every calendar month; that the duty payable under the above mentioned head of charge was to be calculated at the rate of 2*s.* 6*d.* for every 5*l.* and for any fractional part of 5*l.* of the sum of 21*l.* 13*s.* 4*d.*; and that the duty thereon was 12*s.* 6*d.*, and that the matter was concluded by the decisions in *Clifford* v. *Inland Revenue Commissioners* (1) and *Jackson* v. *Inland Revenue Commissioners*. (2)

The question for the opinion of the Court was:—

(1.) Whether the instrument was chargeable with the duty of 6*l.* 10*s.* 9*d.* in accordance with the assessment of the Commissioners.

(2.) If not, with what duty the instrument was chargeable.

Rowlatt J. held himself bound by *Clifford* v. *Inland Revenue Commissioners* (1) and *Jackson* v. *Inland Revenue Commissioners* (2) to hold that the payment was not an annuity, and

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(1) [1896] 2 Q. B. 187.

(2) (1902) 87 L. T. 269.

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he therefore allowed the appeal and ordered repayment of the overpaid duty.

The Crown appealed. The appeal was heard on November 11, 1932.

Sir Boyd Merriman S.-G. and *J. H. Stamp* for the Crown.

Cleveland-Stevens K.C. and *Milner Holland* for the respondents.

The arguments sufficiently appear from the judgments. The following cases were referred to: *In re Cooper* (1); *In re Janes' Settlement* (2); *Clifford* v. *Inland Revenue Commissioners* (3); *In re Morgan* (4); *Lewis* v. *Inland Revenue Commissioners* (5); *Jackson* v. *Inland Revenue Commissioners* (6); *Jones* v. *Inland Revenue Commissioners* (7); *Underground Electric Rys. Co. of London, Ld., &c.* v. *Inland Revenue Commissioners* (8); *Speyer Brothers* v. *Inland Revenue Commissioners* (9); *Gurr* v. *Scudds* (10); *British India Steam Navigation Co.* v. *Inland Revenue Commissioners.* (11)

LORD HANWORTH M.R. This appeal raises a short but interesting and somewhat difficult point. The facts are that a father, minded to pay money to his son, entered into a deed of covenant dated March 31, 1931, which recites that he was desirous of making provision for his son during the joint lives of the parties. It provides that in pursuance of the agreement made between them, and in consideration of natural love and affection, the father undertook to pay "the sum of 21*l.* 13*s.* 4*d.* (hereinafter referred to as 'the monthly sum') on the first day of every calendar month commencing on the first day of April, 1931." Then there is a provision for the protection of that payment which is not uncommon. I express no opinion whether it is effective or not, but that provision for protection is that, if the son

(1) [1917] W. N. 385.
(2) [1918] 2 Ch. 54.
(3) [1896] 2 Q. B. 187.
(4) [1893] 3 Ch. 222.
(5) [1898] 2 Q. B. 290.
(6) 87 L. T. 269.
(7) [1895] 1 Q. B. 484.
(8) [1916] 1 K. B. 306.
(9) [1908] A. C. 92.
(10) (1855) 11 Ex. 190, 191.
(11) (1881) 7 Q. B. D. 165.

should charge it in favour of any other person, payment of the monthly sum should cease, and then it should be paid over to a trustee to be nominated by the father, and the trustee should apply the sum entirely in his discretion as he should think fit for the benefit of the son.

That deed having been entered into it had to be stamped, and those who presented the deed for stamping were content that it should be charged at the rate applicable to an instrument which is a security for the payment of a sum or sums of money at stated periods. The Crown contended that it ought to be stamped on a different basis—namely, on the basis that it was an instrument or covenant which was a security for an annuity. The Commissioners of Inland Revenue who have to determine these questions under the Stamp Act decided that it ought to be stamped at the higher sum on the basis that it was a security for an annuity. From that decision of the Commissioners an appeal was taken to Rowlatt J., and he decided, in accordance with the authority of two cases, *Clifford* v. *Inland Revenue Commissioners* (1) and *Jackson* v. *Inland Revenue Commissioners* (2), to the contrary effect. He allowed the appeal, and it is from his decision determining that the deed was to be stamped at the lower rate that the Crown have appealed.

I ought to say at once that in this particular case the amount involved as against the subject charged is small. It is obvious, however, that to the Revenue as a whole the decision may be of great importance, and may involve a considerable amount of revenue. The Crown, therefore, were fully justified in taking the opinion of the higher Court, more particularly as Rowlatt J. seemed to be uneasy in following the decision in *Clifford's* case (1); but, in order that no harm may be done to the subject, the Crown have undertaken to pay the full costs of all parties, so that the matter has been argued before us by Mr. Cleveland-Stevens at the instance of the Crown, who have given facilities for the matter to be investigated in the Court of Appeal at the cost of the Crown.

(1) [1896] 2 Q. B. 187.

(2) 87 L. T. 269.

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Lord Hanworth
M.R.

The point that has to be decided depends upon the true and proper reading of a passage in the Schedule to the Stamp Act, 1891. That Schedule gives in alphabetical order a number of items relating to documents which are to suffer stamp duty. The particular item which refers to this document is as follows: "Bond, Covenant, or Instrument of any kind whatsoever. (1.) Being the only or principal or primary security for any annuity (*except upon the original creation thereof by way of sale or security, and except a superannuation annuity*), or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack." It may be explained that the exceptions referred to in each limb of the sentence are taken out of the operative part because, whether it is superannuation, annuity or rent reserved by a lease or tack, it will be found that those items fall to be charged under separate items contained in the Schedule. We have, therefore, the simple words as follows: "primary security for any annuity . . . . or for any sum or sums of money at stated periods." It is quite obvious that those words are not easy to construe, because an annuity which is to be paid, be it once a year or twice a year, or four times a year, is a sum of money which is to be paid at a stated period, and when one bears that in mind it is difficult to find a direct and clear antithesis between the two limbs of the item which is introduced by the alternative word "or." As Romer L.J. has pointed out, there must be some words introduced into the second limb, such as "or for any *other* sum" or "or for any sum or sums of money at stated periods *other than an annuity*."

Mr. Stamp called our attention to the passage in the speech of Lord Loreburn in the House of Lords in *Speyer Brothers* v. *Inland Revenue Commissioners* (1) which showed that, where there is a clear alternative given to the Crown to tax under one head or another, the right of choice would belong to the Crown; but it has been for a number of years an unbroken rule of the Courts that, where there is a charging section or charging Act, the meaning of which is in doubt, it ought to be construed in favour of the subject. Pollock C.B. in *Gurr* v. *Scudds* (1) said: "If there is any doubt as to the meaning of the Stamp Act, it ought to be construed in favour of the subject, because a tax cannot be imposed without clear and express words for that purpose."

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(1) [1908] A. C. 92, 95.

The King's Bench Division in *Clifford*'s case (2) followed that rule, which was once more stated, that when the true construction is open to two views, the one more favourable to the Crown and the other to the subject, then the latter construction should be adopted. We, therefore, in considering this passage in the Schedule have to bear in mind that if there is a doubt it ought to be resolved in favour of the subject.

Clifford's case (2) was decided in the year 1896, and, so far as one can see, it has not been doubted, still less overruled. It has been followed by Phillimore J. in *Jackson* v. *Inland Revenue Commissioners.* (3) The facts of *Clifford's* case (2) were these, that there was a manager put in to carry on a business, and, during the time fixed for the duration of the agreement (which could be determined by notice), it was provided that a weekly sum should be paid to the owner. The Court decided that in the case of such a sum there was no necessity, and indeed no right, to compute what was the annual return based upon the total of the sums which would be received in the course of the fifty-two weeks of the year.

I come, therefore, to consider, first of all, the word "annuity." If one were considering the Income Tax Acts, that word would connote a sum which was paid in the year; something which is paid for the year; and it does not for the purposes of those Acts require that there should be a payment over a series of years to induce the tax upon an annuity. That was decided by this Court, and upheld in the House of Lords in *Martin* v. *Lowry.* (4) The Income Tax Act, shortly put, looked to what is paid in the

(1) 11 Ex. 190, 191.
(2) [1896] 2 Q. B. 187.
(3) 87 L. T. 269.
(4) [1927] A. C. 312.

year, and those words "yearly," "annual," and the like, ought to be focussed upon what is done in the course of the twelve months which are the year of assessment. The construction of those words does not afford any assistance to us in the construction of these particular words in this Stamp Act.

Lord Hanworth M.R.

In *Lewis* v. *Inland Revenue Commissioners* (1) it was decided that the deed there was security for an annuity and not for a sum payable at stated periods only. *Clifford's* case (2) was distinguished. It is, however, to be noted that the deed then under construction contained words providing for the payment of a sum every three months by quarterly payments on the usual quarter days in every year, the first of such quarterly payments to be paid in advance on Michaelmas Day. In other words, there were definitely in that case words which indicated a reference to a year; quarterly payments. A quarter of what? The quarter is obviously something less than the whole, and one asks what is the whole? Intrinsically, therefore, in the deed there was a reference to the larger unit, the year.

In *Underground Electric Rys. Co. of London* v. *Inland Revenue Commissioners* (3) a similar decision was reached, Scrutton J., as he then was, holding that the sum secured was a yearly sum. That judgment was accepted by the Court of Appeal. Bankes L.J. said: "It is plainly there stated that the sum secured is the dividend at the rate of 4 per cent. per annum for the time being on the whole of the guaranteed stock, and if that is the right construction of the deed it is quite immaterial that the guarantee is expressed to be a guarantee in respect of each half-yearly payment. The sum secured is the yearly sum." Those cases, *Clifford* (2), *Jackson* (4), *Lewis* (1) and the *Underground Electric Rys.* (3), appear to indicate that it is not merely where you have a provision for the payment of an annuity that the larger stamp duty falls to be paid, but also where you can find that there is a right to a multiple of the sums

(1) [1898] 2 Q. B. 290.
(2) [1896] 2 Q. B. 187.
(3) [1916] 1 K. B. 306, 318.
(4) 87 L. T. 269.

that are to be paid or to aggregate payments within a yearly period. But it appears to me that we have got to take the two limbs of this present passage in the Schedule as alternative, and we have to differentiate the cases where you can determine that a yearly sum is to be paid, and those in which a sum is paid at stated periods without any right to apply to them a system of aggregation or to apply a multiple. If in the terms of the deed it is indicated that the stated payments are necessarily a portion of a larger aggregate, then I think the annuity limb would apply, but where you have payments at stated intervals without any such right to aggregate, or to apply a multiple, there I think you must leave the payments as they are expressed to be made at stated periods, and without bringing them within the earlier portion of the paragraph.

I apply that rule to this present case, for each case must, of course, depend on the actual terms of the instrument, and I see that the deed provides that the payments are to be made only during the joint lives of the father and the son. They might come to an end by the death of either of them in a span less than a year. There is no reference to such words as "quarterly" or "half-yearly" or the like, and I find this case to fall within the test laid down by Bruce J. in *Clifford's* case (1) where he says: "I see no reasonable ground for the contention that the aggregate of the periodical payments for a whole year is to be taken as the amount upon which the duty is to be assessed."

For these reasons I am of opinion that the appeal fails.

LAWRENCE L.J. I agree. This appeal raises a question of some difficulty. The point is whether the deed of covenant in question is an instrument securing an annuity or an instrument securing a sum or sums of money at stated periods within the meaning of the relevant portions of the Schedule to the Stamp Act, 1891. Looking at the relevant words, in my judgment a sharp distinction is drawn between

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(1) [1896] 2 Q. B. 187, 195.

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an instrument securing an annuity and an instrument securing a sum or sums at stated periods. They are taxed at different amounts, which seems to me sufficient to show that the Legislature intended to differentiate between the two.

The Solicitor-General and Mr. Stamp have argued that the two duties overlap and that the Crown is justified in selecting which of the two to exact. In my judgment, that is not the right view. I cannot conceive that the Legislature would in the same sentence impose two duties on the same instrument, with a power of selection in the Crown as to which duty to charge. In my opinion, the two expressions are mutually exclusive, and one has to gather as best one can the distinction between an annuity and a sum at stated periods. It is not an easy task, because there is no definition contained in the Act and, if taken literally, every annuity is a sum or sums at stated periods.

Both the Solicitor-General and Mr. Stamp have asked us to construe the word "annuity" in the popular sense, regardless of the fact that it is contrasted in this enactment with "sums at stated periods," and to say that if the present instrument is looked at it would in the popular sense undoubtedly be called an instrument securing an annuity. I cannot accede to that argument. For some purposes, no doubt, this deed could be said to be an instrument securing an annuity; but when you have to distinguish between a deed securing an annuity and a deed securing a sum or sums at stated periods, I think it is necessary to probe further and not merely to ascertain whether a fixed sum is covenanted to be paid at stated periods during life or other indefinite period, which in general is a sufficient definition of an annuity, but to see whether there is something in the deed which shows that it was intended to secure an annual amount.

The contrast between an annuity and sums payable at stated periods must, I think, be that the one is a yearly amount, though it may be made payable quarterly or half-yearly, and the other is an amount payable at specified periods irrespective of a year. The latter may last less than a year or it may last more than a year, and the Act contemplates that it may be expressed to be payable for life or any other indefinite period. That that is the true construction of the relevant words of the Act I think is shown by *Clifford's* case (1), which was decided so long ago as 1896, and has never been questioned. That case has been distinguished in cases which are also distinguishable from the present case, and although it has been commented upon in the Court of Appeal, no doubt as to its having been correctly decided has been expressed or suggested by that Court, nor did the Solicitor-General contend that the decision in that case on the facts there was otherwise than correct. In my opinion that case is indistinguishable from and entirely covers the present case. It is true that there the sums secured were weekly sums and that in this case we are dealing with monthly sums, but the same reasoning upon which Pollock B. and Bruce J. founded their judgments applies to the present case, and in my opinion both the judgments in that case lay down the true distinction which has to be drawn between annuities and sums at stated periods in view of the wording of this particular enactment.

On the other hand, I think there is a clear distinction between the present case and the cases which were decided the other way. In each of those cases the Court came to the conclusion on the wording of the particular instrument that what was secured was an annuity. This conclusion was only reached because from the wording of the particular instrument the Court was able to deduce that what the parties intended to secure was an annual sum, bringing it within the definition of "annuity" contained in Coke upon Littleton 144b—namely, "a yearly payment of a certain sum of money"—and not within the wider definition which is to be found in Lumley's Law of Annuities and Rent Charges, p. 1, which would comprise all periodical payments at specified times during life or any other indefinite period. Without saying that this latter definition is wrong, it does not apply to a case such as we have to consider. Neither the learned text-book writer in question, nor the Court (in the cases upon

(1) [1896] 2 Q. B. 187.

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the construction of wills and other instruments to which the Solicitor-General has referred) bent himself or itself to the task of distinguishing between an annuity and a sum payable at stated periods.

In my judgment the decision in this case turns entirely upon the true construction of the deed of covenant in question. Upon that I entertain very little doubt. The deed is concisely and clearly expressed; it plainly secures the payment of a sum of 21*l.* 13*s.* 4*d.* on the first day of every calendar month. There is nothing in the deed to suggest that the covenantor intended to secure an annual amount.

For these reasons I think that this appeal fails and ought to be dismissed.

ROMER L.J. During the argument of this case I have felt, and still feel, considerable doubt, but upon the whole I have come to the conclusion that this appeal should be dismissed.

The appeal, of course, turns upon the proper construction to be placed upon the words which appear in Sch. I. to the Stamp Act of 1891 under the title: "Bond, Covenant or Instrument of any kind whatsoever." I do not propose to read those words again. They have already been read by the Master of the Rolls.

We were invited, on behalf of the Crown, to treat the two branches of those words—that is to say, the branch that refers to annuities and the branch that refers to any sum or sums of money at stated periods—as overlapping. I am not prepared to do that. I do not think it would be right to treat the Legislature as having deliberately intended in the same breath, so to speak, to charge at different rates the same instrument. That being so, we must, in my opinion, put such a meaning upon each of the two branches as to prevent them overlapping.

As has been pointed out by the Master of the Rolls, every annuity in the ordinary sense provides for the payment of a sum of money at stated periods. In order, therefore, to prevent the two branches overlapping we must do one of three things, as it seems to me: the first and very obvious thing to do would be to insert the word "other" after the words "or for any," so that the section would read, "security for any annuity or for any other sum or sums of money at stated periods."

Another way of arriving at a similar result—that is to say, avoiding an overlapping—would be to read the second branch as follows: "or for any sum or sums of money at stated periods other than annual periods," realizing that, in the words of Pollock B. in *Clifford's* case (1), "an annuity which, ex vi termini, means an annual payment." I think we are prohibited by a decision of this Court from adopting that particular way out of the difficulty, because in *Underground Electric Rys. Co. of London* v. *Inland Revenue Commissioners* (2) this Court treated as being taxable as an annuity under this section, even if it was not an annuity properly so-called, an annual sum which was not paid annually but which was payable half-yearly. That alternative being excluded, we are therefore thrown back upon the only other alternative to the first suggestion that I have mentioned, and that is this, to read the second branch as follows: "or for any sum or sums of money at stated periods not being an annual sum or sums." So reading the second branch, it would clearly exclude the case of an annual sum covenanted to be paid as an annual sum but expressed to be payable at stated periods. That would bring within the first branch such cases as the *Underground Rys.* case (2) and possibly such a case as that of *Lewis* v. *Inland Revenue Commissioners*. (3) But if it brings within the first branch of the case such a sum as the Court had to deal with in *Lewis's* case (3), the subject is getting on very dangerous ground, because in that case the sum payable at stated periods was treated as an annuity by reason of the fact that the sums were expressed to be paid quarterly. In the present case we have a covenant to pay a sum of so much a month, and it is said that that is in effect a covenant to pay an annual sum, because you have merely to multiply the sum by twelve and you arrive at a particular sum for the year, just as in *Lewis's* case (1) they multiplied the sum by four, because the covenant was to pay a sum on certain days during the year, quarterly. I think, however, the true solution is that which has been indicated by the Master of the Rolls and that every case will have to depend upon the construction of the particular deed in question, and that what will have to be ascertained is whether in truth and in fact the deed is intended to secure an annual sum, although it is payable at periods less than periods of a year, or whether in truth and in fact it provides for other than an annual sum.

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(1) [1896] 2 Q. B. 187, 193.
(2) [1916] 1 K. B. 306.
(3) [1898] 2 Q. B. 290.

In my opinion, according to the true construction of this deed, it does in truth and in fact provide for the payment, not of an annual sum, but of a monthly sum. Therefore, adopting the third alternative that I have mentioned, it seems to me that this case falls within the second branch and not within the first branch of the words in question. But that, of course, does not dispose of the question of whether we ought not to adopt the first alternative that I have mentioned. I think, however, that we should not, and for this reason, that, as was stated by Pollock B. in *Clifford's* case (2), and as has been stated by the Master of the Rolls just now, if a statute is " so indefinite and uncertain that it can be treated in two ways, and the true construction of it is open to two views, the one more favourable to the Crown and the other to the subject, then the latter construction should be adopted." In the present case, I think obviously it would be for the benefit of the subject that we should not adopt the first alternative which I have mentioned, but the third one. Apart altogether from that, it seems to me that this case is really indistinguishable from *Clifford's* case. (3) *Clifford's* case (3) was decided in the year 1896, and has never been overruled or, so far as I know, questioned. It must have been acted upon over and over

(1) [1898] 2 Q. B. 290.
(2) [1896] 2 Q. B. 187, 193.
(3) [1896] 2 Q. B. 187.

again. In those circumstances, I do not think it would be right for us to overrule it.

For these reasons, I have come to the conclusion that the appeal should be dismissed.

Appeal dismissed.

Solicitor for Crown: *Solicitor of Inland Revenue.*

Solicitors for respondent: *J. C. Fox, Gamble & Son.*

W. I. C.

1932
Nov. 29;
Dec. 2.

In re COUNTY BOROUGH OF GATESHEAD (BARN CLOSE) CLEARANCE ORDER, 1931.

Housing—Clearance Order—Business Premises—Persons displaced—Suitable Accommodation—Housing Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 39), *s.* 1, *sub-s.* 1 (*a*).

Where as the result of a clearance order under the Housing Act, 1930, persons of the working classes who occupy shops or licensed premises in the area will be displaced, the local authority is not bound, before passing a resolution declaring the area a clearance area, to satisfy itself under proviso (*a*) of s. 1, sub-s. 1, of the Act that there already exists or that it can provide suitable shop or licensed premises accommodation for such persons. The proviso deals with dwelling accommodation only.

APPLICATION to the High Court under s. 11, sub-s. 3, of the Housing Act, 1930 (20 & 21 Geo. 5, c. 39).

By the County Borough of Gateshead (Barn Close) Clearance Order, 1931, confirmed by the Minister of Health on September 5, 1931, two shops in a building belonging to the applicant, Mrs. Wilkinson—namely, a lock-up shop, 24 and 26 Ellison Street, Gateshead, occupied by a Mrs. English, who did not live on the premises, and another shop, 30 and 32 Victoria Street, Gateshead, to which an off beer licence was attached, occupied by a Mrs. Scott, who lived on the premises, were included in an area to be cleared under the provisions of the above order. The Gateshead Corporation had not, before passing the resolution declaring the area a clearance area, sought to satisfy themselves within

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the meaning of proviso (*a*) of s. 1, sub-s. 1, of the Act, that suitable accommodation either existed or could be provided by them for persons of the working classes who occupied shops or licensed premises in the area who would be displaced by the clearance of the area, but had only satisfied themselves that suitable accommodation either existed or could be provided for those persons with respect to dwelling accommodation. It was assumed for the purposes of the case that all the occupants of the various tenements in the above building, including Mrs. English and Mrs. Scott, were persons of the working classes, and it was admitted that Mrs. Wilkinson was a person aggrieved by the order within the meaning of s. 11, sub-s. 3, of the Act.

It was contended that by reason of the failure of the corporation to satisfy themselves as above, the order was invalid.

J. Charlesworth for the applicant. The sole question for the Court is whether a local authority, before passing a resolution declaring a clearance area, are required to satisfy themselves that suitable accommodation exists or can be provided, which, it is contended, means not only living accommodation but accommodation for shopkeepers, etc. The Act in s. 1, sub-s. 1 (i.) (1), deals with two things, " dwelling-houses" and "other buildings." By proviso (*a*) to sub-s. 1 of s. 1 suitable accommodation has to be found for "persons . . . . displaced," and that obviously includes both persons in dwelling-houses and persons in "other buildings," and the sub-section speaks of displacements "as the demolition of buildings . . . . proceeds"—it does not say "of houses," and sub-s. 3 speaks only of the demolition of "buildings," not "houses." The Act does contemplate that the occupiers of "other buildings,"—which would include shopkeepers—will be displaced: see s. 41. (1) That section, as regards its provisions for compensation, is merely permissive. Sect. 9 (1) provides that before acting on the resolution declaring a clearance area, the local authority must undertake to carry out "re-housing operations." "Re-housing" might seem to refer to dwelling-houses only, but it is submitted that a wider meaning must be given to that word, because power in a local authority to provide housing accommodation includes power to erect buildings to be used as shops: see s. 107 of the Housing Act, 1925 (15 Geo. 5, c. 14), which is to be construed as one with the Act of 1930 (s. 65, sub-s. 1). Although the local authority would not have power to conduct licensed premises they have at least power to erect a building to be afterwards conducted as licensed premises: see

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(1) Housing Act, 1930 (20 & 21 Geo. 5, c. 39), s. 1, sub-s. 1 : " Where a local authority, upon consideration of an official representation or other information in their possession, are satisfied as respects any area in their district—(i.) that the dwelling-houses in that area are by reason of disrepair or sanitary defects unfit for human habitation, or are by reason of their bad arrangement, or the narrowness or bad arrangement of the streets, dangerous or injurious to the health of the inhabitants of the area, and that the other buildings, if any, in the area are for a like reason dangerous or injurious to the health of the said inhabitants; and (ii.) that the most satisfactory method of dealing with the conditions in the area is the demolition of all the buildings in the area, the authority . . . . shall pass a resolution declaring the area . . . . to be a clearance area. . . . . Provided that, before passing any such resolution, the authority shall satisfy themselves—(*a*) that in so far as suitable accommodation available for the persons of the working classes who will be displaced by the clearance of the area does not already exist, the authority can provide, or secure the provision of, such accommodation in advance of

the displacements which will from time to time become necessary as the demolition of buildings in the area, or in different parts thereof, proceeds."

Sect. 9: "A local authority who have passed a resolution declaring any area to be a clearance area . . . . shall, before taking any action under that resolution which will necessitate the displacement of any persons of the working classes, undertake to carry out or to secure the carrying out of such re-housing operations, if any, within such period as the Minister may consider to be reasonably necessary."

Sect. 41: "A local authority may pay to any person . . . . carrying on any trade or business in any such dwelling-house or other building, ... such reasonable allowance as they think fit towards the loss which, in their opinion, he will sustain by reason of the disturbance of his trade or business consequent on his having to quit the house or building, and in estimating that loss they shall have regard to the period for which the premises occupied by him might reasonably have been expected to be available for the purpose of his trade or business and the availability of other premises suitable for that purpose."

(1) Ante, p. 430, note (1).

Conron v. *London County Council.* (1) If they have the power the local authority ought to consider whether they will exercise it. Even if the Court is of opinion that s. 9 only applies to dwelling-houses, that will not affect the interpretation of proviso (*a*) in s. 1, sub-s. 1. The provisions as to repair and demolition in Part II. of the Act apply to houses only, for although under s. 20 the local authority may repair or demolish a dwelling-house over a shop they cannot so deal with the shop, so that the only way of dealing with the latter is under a clearance order. The applicant here is being deprived of rights of property and her case should be entertained sympathetically : per Swift J. in *In re Bowman* (2), and so much of the order as relates to the premises in question should be quashed.

Sir Boyd Merriman S.-G. and *Bowstead* for the Minister of Health. It is plain from an examination of the various sections of the Act that it deals with dwelling accommodation only. Sect. 9 (3) shows that the Legislature was thinking of re-housing only, i.e., taking from one place the persons to be displaced and putting them in another living place. Sect. 9 is supplementary to proviso (*a*) of s. 1, sub-s. 1 ; the local authority are to give an undertaking to the Minister to do that which under the provisions of the proviso they have satisfied themselves they can do. Part III. of the Act, which deals with the provision of housing accommodation, is plainly contemplating dwelling accommodation only : see ss. 25, sub-s. 1 ; 26, sub-s. 1 ; and 27, sub-s. 1 (*a*). The argument on behalf of the applicant, that s. 41 (3) means that in assessing compensation to, e.g., the applicant, the local authority " shall have regard to the . . . . availability of other premises [for her trade or business] suitable for that purpose," is quite inconsistent with the other argument on her behalf that that has been provided for already. In any case the local authority could not provide licensed premises for Mrs. Scott, for that would depend entirely on the licensing justices, and the applicant must say that the order is ultra vires unless the authority can show that they have procured that the justices will grant Mrs. Scott a licence. No doubt under the Housing Act, 1925, which is to be construed as one with the Act of 1930 (s. 65, sub-s. 1), the local authority have power to erect all kinds of buildings—see s. 58 of the earlier Act—but it does not follow that they are bound to do so. Had the Legislature intended to include shops, etc., accommodation it would have been easy to say so.

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(1) [1922] 2 Ch. 283, 297.

(2) [1932] 2 K. B. 621, 633.

(3) Ante, p. 430, note (1).

It is always dangerous to cite decisions under one statute in endeavouring to interpret another, but in *Wilcock* v. *Booth* (1) it was held under s. 1, sub-s. 1 (*c*), of the Increase of Rent, &c. (Amendment) Act, 1919 (9 & 10 Geo. 5, c. 90), that "alternative accommodation" only meant alternative dwelling and not shop accommodation. *Middlesex County Council* v. *Hall* (2) is to the same effect.

Charlesworth in reply. *Wilcock* v. *Booth* (1) and *Middlesex County Council* v. *Hall* (2) were decided under Acts which were dealing with dwelling-houses only. With regard to the provision of licensed premises, the local authority would have to erect a suitable building and then apply for a licence, and if that was refused the applicant's premises occupied by Mrs. Scott would have to be excluded from the clearance order.

Cur. adv. vult.

1932. Dec. 2. SWIFT J. read the following judgment: On September 5, 1931, the Minister of Health confirmed a clearance order, known as the County Borough of Gateshead (Barn Close) Clearance Order, 1931, purporting to be made under the Housing Acts, 1925 and 1930, and on January 20, 1932, a copy of that order was served upon Mrs. Elizabeth Ann Wilkinson, the owner of a building comprised in the clearance area. On October 27, 1932, Mrs. Wilkinson gave notice of appeal by way of application to the High Court under s. 11, sub-s. 3, of the Housing Act, 1930, as a person aggrieved by the order, alleging that the requirements of the

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(1) (1920) 122 L. T. 678.

(2) [1929] 2 K. B. 110.

Housing Acts had not been properly complied with. The appeal came on for hearing before me on November 29, 1932, and it then appeared that the building which Mrs. Wilkinson owned was situated at the corner of Ellison Street and Victoria Street in Gateshead and consisted of two shops with cellars below them, two rooms behind them and living rooms above them. One of the shops numbered 24 and 26 Ellison Street is a lock-up shop occupied by a Mrs. English, and the other, numbered 30 and 32 Victoria Street, is a shop to which an off beer licence is attached and is occupied by a Mrs. Scott. Mrs. Scott also occupies the two rooms behind the shops on the ground floor and one of the rooms above them and the cellars below them, a Mrs. Cain occupies two of the rooms over Mrs. Scott's shop, and a Mrs. Jardine occupies the remaining room.

For the purposes of this case it was assumed by the Solicitor-General, who appeared for the Minister of Health, that all the occupants of the various tenements in the building were persons of the working class, and it was not in any way contested that Mrs. Wilkinson was a person aggrieved by the order so as to be entitled to make an application to this Court under s. 11, sub-s. 3, of the Act of 1930. The only point upon which the applicant relied in seeking to have the order quashed either generally or in so far as it affects any of her property was that the requirements of the Act of 1930 had not been complied with in that the Gateshead Corporation had not, before passing the resolution declaring the area a clearance area, satisfied themselves that suitable accommodation for members of the working classes to be displaced by the demolition of the buildings either existed or could be provided. It was stated in paragraph 5 of her notice of application : " That before passing the said resolution the Gateshead Corporation did not satisfy themselves that accommodation available for persons of the working classes who occupied licensed houses or shops in the area contained in the clearance order either existed or could be provided by the Gateshead Corporation and that dwelling-house accommodation unaccompanied by accommodation for those persons of the working classes who occupied licensed houses or shops in the said area is not suitable accommodation within the meaning of proviso (*a*) in s. 1, sub-s. 1, of the Housing Act, 1930." It was agreed before me that the sole question that I had to decide was whether upon the proper construction of the Housing Acts, 1925 and 1930, the local authority must, before making a clearance order, satisfy itself that suitable accommodation for business purposes as well as for residential purposes will be provided for any persons of the working classes displaced in consequence of the order.

It is quite clear that if this order stands Mrs. English will be deprived of her shop and Mrs. Scott will be deprived of her off-licence, and the applicant's contention is that the order is not valid unless before making it the local authority satisfied itself that other accommodation for their businesses would be provided for them. It was admitted on behalf of the Minister that no evidence of such suitable accommodation had been produced at the inquiry which was held under the Housing Act, 1930, and it was further admitted that the local authority had never considered such a question, but it was contended that the local authority was under no obligation to do so and that the order was valid notwithstanding the fact that it had not done so.

The matter falls to be decided entirely upon the construction which has to be given to the words of the statute of 1930. It is important to remember that that is an Act "to make further and better provision with respect to the clearance or improvement of unhealthy areas, the repair or demolition of insanitary houses and the housing of persons of the working classes." Sect. 1, sub-s. 1, provides: "Where a local authority, upon consideration of an official representation or other information in their possession, are satisfied as respects any area in their district—(i.) that the dwelling-houses in that area are by reason of disrepair or sanitary defects unfit for human habitation, or are by reason of their bad arrangement, or the narrowness or bad arrangement of the streets, dangerous or injurious to the health of the inhabitants of the area, and that the other buildings, if any, in the area are for a like reason dangerous or injurious to the health of the said inhabitants; and (ii.) that the most satisfactory method of dealing with the conditions in the area is the demolition of all the buildings in the area, the authority shall cause that area to be defined on a map in such manner as to exclude from the area any building which is not unfit for human habitation or dangerous or injurious to health and shall pass a resolution declaring the area so defined to be a clearance area, that is to say, an area to be cleared of all buildings in accordance with the provisions hereinafter contained: Provided that, before passing any such resolution, the authority shall satisfy themselves—(*a*) that in so far as suitable accommodation available for the persons of the working classes who will be displaced by the clearance of the area does not already exist, the authority can provide, or secure the provision of, such accommodation in advance of the displacements which will from time to time become necessary as the demolition of buildings in the area, or in different parts thereof, proceeds; and (*b*) that the resources of the authority are sufficient for the purpose of carrying the resolution into effect." Sub-s. 2: "A local authority shall forthwith transmit to the Minister a copy of any resolution passed by them under this section, together with a statement of the number of persons of the working classes who on a day specified in the statement were occupying the buildings comprised in the clearance area." Sub-s. 3: "So soon as may be after a local authority have declared any area to be a clearance area, they shall, in accordance with the appropriate provisions hereafter in this Act contained, proceed to secure the clearance of the area in one or other of the following ways, or partly in one of those ways and partly in the other of them, that is to say—(i.) by ordering the demolition of the buildings in the area; or (ii.) by purchasing the land comprised in the area and themselves undertaking, or otherwise securing, the demolition of the buildings thereon."

The contention here is that in so far as the local authority have not considered accommodation for the businesses carried on by Mrs. English and Mrs. Scott, they have failed to comply with the conditions of the proviso, and, therefore, the scheme is void. I do not accept this view. In my opinion the proviso has nothing to do with business premises and deals only with the provision of dwelling-houses. Sect. 9 provides: "A local authority who have passed a resolution declaring any area to be a clearance area or an improvement area shall, before taking any action under that resolution which will necessitate the displacement of any persons of the working classes, undertake to carry out or to secure the carrying out of such re-housing operations, if any, within such period as the Minister may consider to be reasonably necessary." I think light is thrown on the matter by ss. 25, 26 and 27, and s. 27, sub-s. 1 (*a*), is, I think, particularly helpful. It provides: "Subject to the provisions of sub-section 2 of this section, the special conditions for compliance with which a local authority are required by the last preceding section to give an undertaking are as follows:—(*a*) that the houses shall be let for occupation to tenants who intend to reside therein." Sect. 41 appears to me to put the matter beyond doubt. By the latter part of that section it is provided: "To any person carrying on any trade or business in any such dwelling-house or other building, they"—that is the local authority—"may pay also such reasonable allowance as they think fit towards the loss which, in their opinion, he will sustain by reason of the disturbance of his trade or business consequent on his having to quit the house or building, and in estimating that loss they shall have regard to the period for which the premises occupied by him might reasonably have been expected to be available for the purpose of his trade or business and the availability of other premises suitable for that purpose." If the contention of the applicant was correct I think the last line, "the availability of other premises suitable for that purpose," would be utterly useless, as if alternative accommodation for business had to be provided by the local authority there could be no consideration as to the availability of business premises in assessing the amount to be paid to the person to be dispossessed. It seems to me that this section is in conformity with the whole scheme of the Act, which is to provide dwelling-houses for people who are displaced in the clearance area, and except for the possibility of giving compensation by this section to business people who are displaced, it, I think, makes no provision for their benefit.

Sect. 62 also, I think, confirms this view. By sub-s. 2 it is provided: "For the purposes of any provisions of this Act relating to the provision of housing accommodation, the expressions 'house' or 'dwelling-house' include, unless the context otherwise requires, any part of a building which is occupied, or intended to be occupied, as a separate dwelling."

If the contention of the applicant were to be held right, there would be no clearance scheme for any area in which licensed premises were situated. This is quite inconsistent with s. 47 of the Housing Act, 1925. It is, I think, impossible to believe that the Legislature intended to put upon the local authority the necessity of erecting another building on the site which would be suitable for licensed premises and of obtaining from the licensing justices a transfer of the licence to that new building before they could require the demolition of Mrs. Scott's dwelling.

I hold, therefore, that the applicant fails and this application is dismissed with costs.

Application dismissed.

Solicitors for applicant: *King, Wigg & Brightman, for F. J. Lambert, Gateshead.*

Solicitor for respondent: *Solicitor to Ministry of Health.*

W. L. L. B.

ATTORNEY-GENERAL *v.* ARTS THEATRE OF LONDON, LIMITED.

K. B. D.
1932
June 17.
C. A.
Nov. 11, 14.

Revenue—Entertainments Duty—Club—Theatre attached to Club—Admission limited to Members of Club—Admission only upon Payment—Prices charged to cover Cost of Production—Two Classes of Members—Annual Subscriptions—Associate Members paying much lower Subscriptions than Full Members, with fewer Club Privileges, but with Right to attend Theatrical Performances—"Payments for admission to any entertainment"—Finance (New Duties) Act, 1916 (6 *Geo.* 5, *c.* 11), *s.* 1, *sub-ss.* 1, 4.

Sect. 1 of the Finance (New Duties) Act, 1916, which imposes a duty on payments for admission to entertainments, by sub-s. 4 provides: "Where the payment for admission to an entertainment is made by means of a lump sum paid as a subscription or contribution to any club . . . . for the right of admission to a series of entertainments or to any entertainment . . . . the entertainments duty shall be paid on the amount of the lump sum, but where the Commissioners are of opinion that the payment of a lump sum or any payment for a ticket represents payment for other privileges . . . . besides the admission to an entertainment . . . . the duty shall be charged on such an amount as appears to the Commissioners to represent the right of admission to entertainments in respect of which entertainments duty is payable."

A club was formed with the object of creating a social rendezvous and providing its members with the amenities of a London club, including the provision of meals and refreshments. In addition it provided its own theatre on the club premises and produced regularly at the theatre with professional casts new plays and revivals for short runs, and also provided therein concerts, lectures, etc. There were two classes of members—namely, full members, who paid annual subscriptions at full rates and enjoyed all the privileges and amenities of the club, and associate members, who paid annual subscriptions at much lower rates than the full members, and were entitled only to a few of the privileges of the full members. Both full members and associate members were entitled to enter the theatre and attend the theatrical performances given there upon payment of the prices charged for admission, which were the same for both full members and associate members, and varied according to the cost of production of each play, and were calculated so as to cover the cost of production throughout each year. There was no admission for the public at large. The Commissioners of Customs and Excise determined that a portion of the subscriptions paid by both full members and associate members was in respect of the right of admission to entertainments and that entertainments duty was payable thereon:—

Held, by Finlay J., on the facts, that a portion of the annual subscriptions paid both by the full members and the associate members was paid in order to entitle them to join the privileged class of persons who alone had the right, upon making a further payment, to be

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admitted to the entertainments in the theatre, and that that portion of the annual subscriptions was chargeable with entertainments duty.

On appeal it was contended on behalf of the appellants that the duty could not attach, because s. 1, sub-s. 4, of the Act of 1916 referred to a payment for admission and not to a part payment for admission to an entertainment :—

Held, by the Court of Appeal, that under s. 1, sub-s. 4, of the Act of 1916 the Commissioners were charged with the duty of breaking up the lump sum paid in respect of the subscription paid to the club to see whether there was contained in it a sum which represented any payment for admission to the theatre, and that if it did, the tax attached; and that even though, subsequently or successively, there might have been a direct payment for the ticket of admission which was used by the member, nevertheless the totality of the two sums which had been paid represented a payment made for admission to an entertainment of which he had paid the first portion in his subscription to the club and the second portion directly in the purchase of his ticket, and that the duty was payable on the totality of the two sums paid for admission.

Held, therefore (affirming the decision of Finlay J.), that the tax attached.

TRIAL of special case before Finlay J.

The Attorney-General, on behalf of the Crown, claimed to recover the sum of 115*l*. 4*s*. 1*d*. for duties due and payable by the defendants, the Arts Theatre of London, Ld., under s. 1 of the Finance (New Duties) Act, 1916 (6 Geo. 5, c. 11), and other statutes relating to the revenue of excise. The Attorney-General and the defendants concurred in stating the question of law arising upon the following agreed facts in the form of a special case for the opinion of the Court pursuant to Order LXVIII., r. 2, and Order XXXIV., r. 1.

CASE.

1. The defendants (hereinafter called "the company") were a limited liability company incorporated under the Companies Acts, 1908–1917, on December 7, 1925.

2. The company were the proprietors of a proprietary club called The Arts Theatre Club (hereinafter called "the club"), situate at 6 and 7 Great Newport Street, in the county of London.

3. The club was established in the early part of 1927. Its objects were as follows :—

(A) To create a social rendezvous with the amenities of a London club and bring together those interested in the theatre from both sides of the curtain.

(B) To found and support its own theatre in the club premises.

(C) To supply its members with food and refreshments and wines and spirits at reasonable prices.

(D) To produce, or to co-operate with others in producing regularly at the theatre, with professional casts, for short runs of a week or a fortnight (including Sundays), new plays and revivals with change of cast for each production, and also to hold concerts, lectures and debates.

(E) To encourage the work of new playwrights, composers and of those associated with broadcasting.

(F) To foster an interchange of ideas between players and playgoers.

(G) To promote a high standard of dramatic art and entertainment.

4. The premises of the club at 6 and 7 Great Newport Street aforesaid were constituted as follows :—

In their rear was built a fully equipped modern theatre, with an auditorium consisting of stalls, circle and boxes, to accommodate approximately 350 people.

The ground floor of the premises consisted of a lounge hall with recess for writing, booking and inquiry offices, a writing compartment, and the approaches to the stalls, circle and boxes, and at a lower level the theatre foyer and buffet, and theatre cloak-rooms.

On the first floor were situated the club cloak-rooms and large lounge (with reading and writing accommodation).

On the second floor was a large dining and grill-room and kitchen.

On the third floor was also a large dining-room.

The theatre comprised a compact portion of the premises separated from the rest by doors.

5. The rules and by-laws of the club existent during the year 1931 were contained in the Book of Rules and By-laws annexed to the case, and such rules and by-laws might be referred to as part of the case.

6. Under rule 3 all entrance fees, subscriptions and other payments by members (other than payments for wines,

spirits and intoxicating liquors) became the property of the company, and the company were to be solely responsible for the provision of the premises and all things necessary for carrying on the club, except wines, spirits and intoxicating liquors, and were to have entire control of all matters of finance in connection with the club, and the only liability of members was for such payments to the company as were provided for by the rules.

7. Rules 4, 7, 8, 10 and 11 were as follows :—

(4.) The club shall consist of members of both sexes, the number of whom shall, from time to time, be determined by the committee.

Such persons as the committee may from time to time appoint shall be admitted as honorary members.

The committee may elect, upon such terms as to subscriptions as they may from time to time determine, associate members of the club ; such members shall have the right, upon payment of the same prices of admission as ordinary members, to attend performances in the theatre, and may use such portions of the club premises as are not reserved exclusively for full members of the club.

Members must produce their membership cards on the request of servants of the club in the execution of their duty.

(7.) Subscription and entrance fee for full or associate membership shall be such as the committee with the assent of the directors may from time to time decide.

(8.) Subscriptions are payable upon election and subsequently on the 1st February or 1st May or 1st August or 1st November in each year. The membership of persons elected between any of the aforesaid dates will run for one year from whichever of the dates aforesaid next precedes election.

If any member's subscription is in arrear, or other money due to the club be unpaid for fourteen days after becoming due, all rights and privileges of membership will be withheld from that member until the amount due is fully paid.

(10.) The theatre of the club shall, except as to persons performing therein and those admitted upon complimentary tickets, be reserved exclusively for members, associate members and their guests upon such terms and conditions as from time to time the directors shall consider necessary or desirable. Provided always that no member, associate member or guest shall be entitled to enter the theatre of the club except upon payment of the price of admission and the appropriate entertainments duty upon such payment. The payment of the annual subscription confers no right of admission to the theatre of the club.

(11.) Every member of the club may introduce guests at such times and upon such conditions as the committee may determine. Such fee as may be fixed from time to time by the committee shall be charged for each visitor so introduced. At the discretion of the committee, the number of guests for each member may at any time be limited, and the admission fee altered or eliminated. Members, before introducing guests into the club, must enter their names in the book kept for that purpose. The club committee reserve the right of refusing admission to any visitor without giving any reason for such refusal. No visitors may order or pay for refreshments. Should they do so, or attempt to do so, they will at once be ejected from the club and the member who introduced them may have his membership cancelled. Visitors must leave at the same time or prior to the member introducing them.

Members may purchase for themselves and their guests tickets for admission to the theatre in accordance with the terms and conditions fixed by the directors from time to time. The directors shall have power, as and when they may deem necessary, to close or reserve any portion of the club premises, including the club theatre.

8. During the period January 17, 1931, to November 30, 1931, the rates of annual subscriptions fixed under rule 7 were for full members at various rates which differed according to the circumstances of the case as follows: 1*l.* 1*s.*, 2*l.* 2*s.*, 3*l.* 3*s.*, 4*l.* 4*s.* and 5*l.* 5*s.*; and for associate members at various rates which differed according to the circumstances of the case as follows: 5*s.* and 10*s.*, and after September 15, 1931, also 12*s.* 6*d.*

9. The club was in fact a social rendezvous and apart from the theatre provided its members with the amenities of a London club, including the provision of meals and refreshments, and these amenities were largely used by the members and their guests.

10. Throughout the said period, January 17, 1931, to November 30, 1931, lectures and dramatic and other similar performances, being entertainments such as are defined by the Finance (New Duties) Act, 1916, were given by the club at the theatre. Admission to these entertainments was reserved to members and associate members of the club and their guests only, except to persons performing therein and those admitted upon complimentary tickets, and such entertainments were well attended by members, associate members and their guests. The directors of the company advertised the forthcoming productions of these entertainments to the members and associate members from time to time, and fixed the prices to be paid for tickets for the stalls, circle and boxes at amounts varying from 3*s*. 6*d*. to 12*s*. 6*d*., with special charges for the boxes.

11. Each play was produced either for a single night or for a few nights only. No play had ever been produced for longer than twelve nights. The intention of the company in producing a play at the theatre was that the play should be in the nature of a demonstration production by way of encouragement to authors and actors who were very ready to have produced or to take part in new or unusual plays before an audience including a large number of persons interested professionally in the drama. The result of such productions was to introduce to the notice of the public new authors, new plays, and actors, some of whom were not well known.

These considerations, not involving the necessity for elaborate scenery and effects but at the same time involving very much lower salaries paid to the actors than would otherwise be the case, allowed of the productions at prices charged for the seats in the theatre comparable with but on the whole lower than those charged in theatres open to the

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public. The prices charged might vary according to the cost of production of each play and were calculated accordingly so as to cover the cost throughout each year of the productions.

12. No members or associate members could or did obtain admission to any of the said entertainments unless he had previously obtained a ticket and paid the appropriate price charged for it. Entertainments duty under s. 1 of the Finance (New Duties) Act, 1916, was duly paid upon all payments so charged for any such tickets issued during the period aforesaid, but no entertainments duty had been paid in respect of the amounts paid by members and associate members for annual subscriptions.

13. Full members of the club, including lady members, who had paid their annual subscriptions during the period aforesaid were entitled generally and subject to the said rules to enjoy all the amenities of the club and the right to purchase tickets issued for any of the entertainments before referred to.

14. The associate members of the club who had paid their annual subscriptions during the period aforesaid possessed under rule 4 the right upon payment of the same prices of admission as ordinary members to attend performances at the theatre and to use such portions of the club premises as were not reserved exclusively for full members of the club. During the period aforesaid the associate members were permitted to use the following portions of the club premises—namely, the whole of the ground floor of the club premises, which included the use of the lounge and writing rooms, the inquiry office and the foyer of the theatre, where light buffet luncheons and teas were served, and telephones, cloak-rooms, etc., and to enjoy therein the usual amenities of a club.

15. During the said period from January 17, 1931, to November 30, 1931, the full members and associate members of the club paid subscriptions at the following rates :—

From January 17, 1931, to September 14, 1931.

965	full	members	at 4*l.* 4*s.*
477	,,	,,	,, 3*l.* 3*s.*
185	,,	,,	,, 2*l.* 2*s.*
1752	associate	members	at 10*s.*

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From September 15, 1931, to November 8, 1931.

12 full members at 5*l.* 5*s.*
166 ,, ,, ,, 4*l.* 4*s.*
25 ,, ,, ,, 3*l.* 3*s.*
52 associate members at 12*s.* 6*d.*
58 ,, ,, ,, 10*s.*

From November 9, 1931, to November 30, 1931.

16 full members at 5*l.* 5*s.*
50 ,, ,, ,, 4*l.* 4*s.*
4 ,, ,, ,, 3*l.* 3*s.*
18 associate members at 12*s.* 6*d.*
108 ,, ,, ,, 10*s.*

From January 17 to November 30, 1931.

76 associate members at 5*s.*

Subcriptions were also paid by a number of supernumerary members.

16. Upon being furnished by the defendant company with particulars of the amounts paid by members and associate members during the period January 17, 1931, to November 30, 1931, as set out in paragraph 15, the Commissioners of Customs and Excise by their order dated December 28, 1931, purporting to be made in exercise of the powers conferred on them by sub-s. 4 of s. 1 of the Finance (New Duties) Act, 1916 (1),

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(1) Finance (New Duties) Act, 1916, s. 1, sub-s. 1: "There shall as from" May 15, 1916 "be charged, levied and paid on all payments for admission to any entertainment as defined by this Act an Excise duty (in this Act referred to as 'entertainments duty') . . . ."

Sub-s. 3: "Entertainments duty shall be charged in respect of each person admitted for payment. . . ."

Sub-s. 4: "Where the payment for admission to an entertainment is made by means of a lump sum paid as a subscription or contribution to any club, association, or society, or for a season ticket or for the right of admission to a series of entertainments or to any entertainment during a certain period of time, the entertainments duty shall be paid on the amount of the lump sum, but where the Commissioners are of opinion that the payment of a lump sum or any payment for a ticket represents payment for other privileges, rights or purposes besides the admission to an entertainment, or covers admission to an entertainment during any period for which the duty has not been in operation, the duty shall be charged on such an amount as appears to the Commissioners to represent the right of admission to entertainments in respect of which entertainments duty is payable."

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determined that the amount of each subscription to the Arts Theatre Club which represented the right of admission to entertainments in respect of which entertainments duty was payable was as set out below and that entertainments duty was payable on each such amount.

Subscriptions paid *before* *September* 15, 1931.	£	*s.*	*d.*	Dutiable *amount* *Inclusive of Duty.* *s.*	*d.*
Men at	5	5	0	3	4
,, ,,	4	4	0	3	4
,, ,,	3	3	0	3	4
,, ,,	1	1	0	nil	
Women at	5	5	0	3	4
,, ,,	4	4	0	3	4
,, ,,	3	3	0	3	4
,, ,,	2	2	0	3	4
,, ,,	1	1	0	nil	
Associates at		10	0	3	4
,, ,,		5	0	1	8
Subscriptions paid *on and after* *September* 15, 1931.	£	*s.*	*d.*	*s.*	*d.*
Men at	5	5	0	4	2
,, ,,	4	4	0	4	2
,, ,,	3	3	0	4	2
,, ,,	1	1	0	nil	

Sub-s. 6: "For the purpose of the provisions of this Act relating to entertainments duty—

The expression 'entertainment' includes any exhibition, performance, amusement, game or sport to which persons are admitted for payment; and the expression 'admission to an entertainment' includes admission to any place in which the entertainment is held.

The expression 'admission' means admission as a spectator or one of an audience, and the expression 'payment on admission' includes any payment made by a person who, having been admitted to one part of a place of entertainment, is subsequently admitted to another part thereof for admission to which a payment involving duty or more duty is required. . . ."

	£	s.	d.	s.	d.
Women at	5	5	0	4	2
,, ,,	4	4	0	4	2
,, ,,	3	3	0	4	2
,, ,,	2	2	0	4	2
,, ,,	1	1	0	nil	
Associates at		12	6	4	2
,, ,,		10	0	3	4
,, ,,		5	0	1	8

17. On December 28, 1931, by letter this decision was communicated to Messrs. Bartlett & Gluckstein, the solicitors acting for the company, and formal demand made for the payment by the company of 115*l.* 4*s.* 1*d.* as the amount of duty due in respect of the period January 17, 1931, to November 30, 1931, according to such decision in respect of the subscriptions paid by full members and associate members as set out in paragraph 15. No payment of duty was demanded in respect of subscriptions paid by supernumerary members. By their letter of December 29 Messrs. Bartlett & Gluckstein on behalf of the company intimated that their client had decided to decline to pay and to contest the claim upon the ground that it was not liable to pay the amount of the duty claimed.

18. The question for the opinion of the Court was whether the said payments made by full members and associate members of the club for annual subscriptions or any part thereof were legally chargeable with entertainments duty under s. 1 of the Finance (New Duties) Act, 1916.

19. If the Court pronounced in the affirmative judgment was to be entered for His Majesty for the sum of 115*l.* 4*s.* 1*d.* If the Court pronounced in the negative judgment was to be entered for the company.

Sir Boyd Merriman S.-G. and *Bowstead* for the Crown. Under s. 1, sub-s. 1, of the Finance (New Duties) Act, 1916, entertainments duty is to be charged, levied and paid on all payments for admission to any entertainment. The question in this case is whether there was a payment for admission to an entertainment in the subscription paid by the members of this club. The contention on behalf of the Crown is that the subscription formed part of the payment made by the members of the club for admission to the club theatre notwithstanding that a member when he exercised his privilege on any particular occasion also made a payment for admission. The fact that the members made some payment for admission to the entertainment does not prevent some part of the subscription being referable to admission to the entertainment. The payment of the subscription entitles the members to join a privileged class of persons who alone have the right, upon making a further payment, of admission to the entertainment, and therefore some part of the subscription is liable to entertainments duty, and it is for the Commissioners to assess that amount under s. 1, sub-s. 4, of the Act of 1916. There is no authority on this precise point. In *Attorney-General* v. *McLeod* (1) there was a Freemasons' festival consisting of a dinner followed by a concert. Persons attending the festival paid a guinea and the Crown claimed entertainments duty in respect thereof. It was conceded that the dinner apart from the concert was not an entertainment. The dinner was the main part of the proceedings, the concert being subsidiary and separate. It was held that the concert must be regarded as an essential part of the festival and as a part separate and distinct from the dinner, and that as the guinea was a lump sum paid in the expectation that it would secure admission to a concert, and did in fact secure such admission, entertainments duty was payable, and that it was for the Commissioners to determine under s. 1, sub-s. 4, what portion of the lump sum represented the right of admission to the concert. In *Attorney-General* v. *Swan* (2) the Essex County Cricket Club had a playing ground, vested in trustees for the club, on which matches were played. The public were admitted on payment. Members paid an annual subscription which gave them, among other privileges, that of admission as spectators. The matches were admitted to be entertainments. The Commissioners found that a portion of the subscriptions was paid for admission to the matches, and it was held that that portion was liable to entertainments duty. Roche J. said (1): "The contention of the Attorney-General and the true construction of the sub-section seem to me to be this: that if in fact people pay a sum of money for admission to an entertainment, then entertainments duty is payable, notwithstanding that the payments are made in the form of subscriptions to a club." In *Attorney-General* v. *Valentia* (2) the Court of Appeal held that entertainments duty was chargeable on a proportion of the subscriptions and entrance fees of the members of the Hurlingham Club, who, in addition to certain club privileges, had the right to attend polo matches and tennis and other tournaments provided by the club. The Master of the Rolls said that "it seemed to him that that was perfectly clear, and it was in accordance with the decision in the case of the Essex County Cricket Club—*Attorney-General* v. *Swan* (3)—where it was held that if the public were admitted by payment, and club members paid subscriptions entitling them to admittance, entertainment tax was payable upon those subscriptions as provided by the section. He agreed with the decision in that case by Roche J." Warrington L.J. said that "it was clear that these were entertainments, and that the tax was payable where subscriptions gave the right of entry without further payment." It is clear from these cases that where the payment of a subscription enables the member of a club to obtain admission to an entertainment without further payment the subscription includes the payment for admission. The fact that a charge is made for admission to the entertainment will not necessarily prevent the club subscription including payment for admission. To some extent it is a question of degree. In the present case it is clear that the associate members paid their subscription of 5*s*. or 10*s*. chiefly for the right of joining a privileged class of persons who alone could by payment obtain admission to the entertainments. If that is so, part of their subscription is payment for admission and therefore subject to entertainments duty.

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(1) [1918] 1 K. B. 13.

(2) [1922] 1 K. B. 682.

(1) [1922] 1 K. B. 687.
(2) (1924) 41 Times L. R. 78, 79.
(3) [1922] 1 K. B. 682.

and the same amount of the full members' subscriptions would equally be liable to entertainments duty as being a payment for admission to an entertainment, the balance of the subscription being regarded as a payment for the club privileges.

Cyril King for the defendants. The rule in matters of taxation is that unless the taxpayer can, upon a strict interpretation of the taxing statute, be brought within the ambit of the statute, he is entitled to exemption from the tax. Here s. 1, sub-s. 1, of the Act of 1916 provides that entertainments duty shall " be charged, levied and paid on all payments for admission to any entertainment," and sub-s. 3 provides that " entertainments duty shall be charged in respect of each person admitted for payment." The expression " admission " is defined in sub-s. 6 as meaning " admission as a spectator or one of an audience." My submission is that the payment for admission, which is the subject of the charge in sub-s. 1, is the payment which secures admission to view the entertainment in whatever place it may be held. Prima facie, it is the approximate cost of the right to view the entertainment which is the subject of the charge. Sub-s. 4 of s. 1, upon which the Solicitor-General relies, does not extend the charge which is made in sub-s. 1. Sub-s. 4 does not say that the payment of a lump sum as a subscription to a club is payment for admission to an entertainment. Before the Commissioners have jurisdiction under sub-s. 4 to dissect a lump sum payment, it must be found to consist of payments for two separate things—namely, payment for a right of admission to an entertainment, and secondly, payment for some other privilege or right. The argument on behalf of the Crown here is that the payment of the club subscription is in part the same as the payment for admission to an entertainment, whereas it is stated in the special case that the payment of the subscription gives no right to a member of this club to view the entertainment. When a person joins this club paying an annual subscription with a right to enter the club theatre upon special terms, he cannot be said to have paid the subscription for the right of admission to an entertainment.

[FINLAY J. Suppose members of a club had the right after payment of their subscriptions to attend theatrical performances at the club upon payment of, say 1*s.*, whereas members of the public were admitted upon payment of, say 10*s.* 6*d.*, would not the subscription be paid in part for the right of admission to the entertainment ?]

That case would be like *Attorney-General* v. *Valentia* (1) and *Attorney-General* v. *Swan.* (2). Further, the question is academic, as it does not arise in this case as members of the public are not admitted to the theatre. It is found in paragraph 11 of the case that "the prices charged [for admission] may vary according to the cost of production of each play and are calculated accordingly so as to cover the cost throughout each year of the productions. The inference ought not to be drawn that the associate members pay a smaller subscription than the full members because they are paying for the right to view the entertainment in the theatre ; the real reason why the associate members pay a smaller subscription than the full members is because the club privileges which the associate members enjoy are of much less value than those which the full members enjoy. There is no evidence in the case, other than the difference in the subscriptions, to support the suggestion that part of the subscriptions paid by the associate members is for admission to the theatre. The fact that the charges made for admission are based on the cost of the production is destructive of the contention that any part of the subscriptions paid either by the full members or by the associate members can be attributed to the right to view the entertainment. To say that the subscriptions are paid for the right of joining a privileged class of persons who alone can obtain admission, by payment, to the entertainment, does not solve the problem. Suppose a college at Oxford gives a ball to which only person who are members of the college can obtain admission on payment. If the argument on behalf of the Crown is correct some part of the college fees which the members have paid for their education must be

(1) 41 Times L. R. 78.

(2) [1922] 1 K. B. 682.

attributed to the price of admission, because only a privileged class have the right of admission. Before entertainments duty can be charged there must be a payment for admission. Roche J. put it quite clearly in *Attorney-General* v. *McLeod* (1), the case of the Freemasons' festival consisting of a dinner followed by a concert. He said (2): "I am clearly of opinion that if money is paid in the expectation that it will secure admission to a concert, and it does in fact secure such admission, entertainments duty is payable." In *Attorney-General* v. *Swan* (3) Roche J. said (4): "The contention of the Attorney-General and the true construction of the sub-section seem to me to be this: that if in fact people pay a sum of money for admission to an entertainment, then entertainments duty is payable, notwithstanding that the payments are made in the form of subscriptions to a club." The fundamental consideration is whether the payment of a subscription does give the right of admission to an entertainment. If that be so, then the fact that the subscription is paid for other rights and privileges will not prevent it being dissected. The facts in the present case, however, show that no part of the subscriptions was paid for the right of admission to an entertainment. There is a clear distinction between the present case and *Attorney-General* v. *Valentia* (5) and *Attorney-General* v. *Swan* (3), where nothing was paid by the members of the clubs for admission to the polo and cricket matches beyond the payment of their subscription. In those cases part of the subscriptions were clearly referable to admission to an entertainment, and therefore subject to entertainments duty.

Sir Boyd Merriman S.-G. in reply. The contention, that the right to admission to the club theatre is obtained not by the subscription but by the prices paid for admission, which are fixed so that the theatre should be self-supporting, is not sound. The right of admission to the theatre is one of the members' privileges of membership, which are obtained by the payment of the subscription. Rule 8 provides that "if any member's subscription is in arrear . . . . for 14 days after becoming due, all rights and privileges of membership will be withheld from that member until the amount due is fully paid." Warrington L.J. said in *Attorney-General* v. *Valentia* (1), according to the shorthand note: "One has only to look at the rules and you find that [a member of the club] does purchase all the rights and privileges of a member by paying his subscription, because it is expressly provided by the rules that until he has paid his subscription for a current year he shall not enjoy any privileges. It is quite clear that he has paid for it; and as he pays for it, then the answer to the other point is that it is left to the Commissioners to decide how much is to be attributed to that." That applies to the present case. It is true that a member of this club pays for his ticket of admission to the theatre, but it is his privilege to pay for the ticket because he is a member. No one except a member can obtain a ticket of admission, and therefore some part of the subscription which a member pays is referable to his right of admission to the theatre.

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(1) [1918] 1 K. B. 13.
(2) Ibid. 21.
(3) [1922] 1 K. B. 682.
(4) Ibid. 687.
(5) 41 Times L. R. 78.

Finlay J. Notwithstanding the very able argument of Mr. King for the defendants I think that I must decide this case in favour of the Crown. The case is somewhat peculiar, and though I think the principles laid down in the various decisions cover the present case when the facts are understood, none the less the case must be considered novel in the circumstance that no case with facts resembling these appears to have come before the Courts.

The matter turns upon the entertainments tax, and the relevant statute is the Finance (New Duties) Act, 1916. By s. 1, sub-s. 1, an entertainments tax is imposed. The rates have been varied since, but the tax remains in force. Sub-s. 3, to which my attention was called by Mr. King, says that "entertainments duty shall be charged in respect of each person admitted for payment." Sub-s. 4 is undoubtedly important: "Where the payment for admission to an entertainment is made by means of a lump sum paid as a subscription or contribution to any club, association, or society . . . . but where the Commissioners are of opinion that the payment of a lump sum . . . . represents payment for other privileges, rights or purposes besides the admission to an entertainment . . . . the duty shall be charged on such an amount as appears to the Commissioners to represent the right of admission to entertainments in respect of which entertainments duty is payable."

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(1) 41 Times L. R. 78.

The substantial question of fact I am just about to examine is whether there was here by means of a lump sum paid as a subscription any payment for admission to an entertainment. Substantially the argument for the defendants is that there was not, because though the subscription was admittedly paid and though admittedly as the result of that subscription the members who paid it, whether full members or associate members, acquired the right of paying for admission to the theatre, none the less, inasmuch as payment was made by members for admission to the theatre at a rate which, as is found as a fact, was calculated to cover the expenses of the theatrical productions there produced, it cannot be said that the subscription was a payment for admission. To put it in the simplest possible form, what Mr. King says is that the subscription was not a payment for admission, because in order to obtain admission a member was obliged to pay a sum of money which was calculated as being, together with the sums paid by other people, likely to pay for the entertainment.

It is, of course, necessary in a case of this sort to see what the exact facts are. I will deal with the facts first, and then consider the cases. The matter relates to a club called the Arts Theatre Club. It is a club which was established early in 1927, and its object, broadly speaking, was to promote the interests of the theatre generally by bringing together in a social club playgoers and actors and actresses, and also, as an important part of its objects, to produce theatrical entertainments, which for one reason or another might not be likely to be produced at a theatre in the ordinary way, or for other reasons might be not considered likely to be produced. One matter to which my attention was called at a late stage, and which is not wholly negligible, is that the entertainment could in the circumstances be produced on a Sunday night. Now the club is a club in the ordinary way. There are dining-rooms and lounges and the ordinary things which would be found in a club, and there is attached to the club as part of the premises the theatre where the plays are produced. The material rules of the club are set out in the case. The club consists, broadly speaking, of full members and associate members. A full member pays his subscription, which varies a little according to whether he chooses to pay an entrance fee or not, and for that subscription he acquires the full right of using this building as a club, to have lunch or tea there, or do any of the various things which can be done at a club. There are in addition associate members who pay a much lower subscription. They have certain privileges with regard to the use of the club-house, but it is quite apparent that for those subscriptions, as compared with those of the full members, their privileges with regard to the use of the club are rather small. The bulk of the club premises, the dining-rooms and so on, are reserved for the full members. Now so far I have been dealing with what may be regarded as ordinary club privileges enjoyed fully by full members and to some slender extent by associate members.

It is important now to consider the position with regard to the theatre. It is stated in rule 10 that "The theatre of the club shall, except as to persons performing therein and those admitted upon complimentary tickets, be reserved exclusively for members, associate members and their guests upon such terms and conditions as from time to time the directors shall consider necessary or desirable. Provided always that no member, associate member or guest shall be entitled to enter the theatre of the club except upon payment of the price of admission and the appropriate entertainments duty upon such payment. The payment of the annual subscription confers no right of admission to the theatre of the club." In fact lectures and entertainments were also given in the theatre, and admission thereto in accordance with the rules was reserved to members and associate members of the club and their guests. The entertainments were advertised to the members, and the prices of admission varied apparently very considerably, but I suppose were calculated and fixed with reference to the expenses of production and probably to the run of the production. It is found that the prices charged may vary according to the cost of production of each play, and they are calculated accordingly so as to cover the cost throughout each year of the productions. The details with regard to the subscriptions are set out in the case. There are a number of full members of the club and also a large number of associate members of the club; and while the privileges of associate members and members with regard to the use of the club premises are very different, their privileges with regard to the right of attending the performances are the same. It was pointed out to me that a member whose subscription is in arrear for fourteen days loses the privileges of membership, and among other things he loses of course the privilege, which is a privilege of membership, of purchasing tickets for these theatrical entertainments.

The question for my consideration upon these facts is whether there is material justifying the Commissioners in holding that the subscriptions paid by the full members and associate members were in part paid for admission to an entertainment. I regard it as being a question of fact and degree. I put in the course of the argument a purely imaginary case where the members of the club were entitled, after paying their subscriptions, to buy tickets for admission to an entertainment at a lower rate than the general public, and I asked whether it would be possible in such a case to say that the subscription which conferred that right of admission to the entertainment at a lower rate than the public was not partly paid for admission to an entertainment.

Now here the substance of the matter, as it seems to me, is this. A particular and privileged class of persons alone can obtain admission to these entertainments—namely, the members of the club, and they can obtain admission by payment for themselves and for their guests. If one looks at the matter, as one must I think, as a question of fact and degree, I cannot for a moment doubt that the very large number of associate members who belong to this club pay their subscriptions to a large extent in respect of the right to obtain admission to these entertainments upon payment of the price charged—a right which one can well understand is valuable to a great number of people who may be connected in one way or another with the theatrical profession. It seems to me that that is on the facts the substance of the matter, and I cannot myself doubt there are facts here which justify the conclusion that the main inducement for the payment of the subscription by the associate members, and to some extent probably by the other members, is to be attributed to and regarded as the purchase of the right by further payment to attend these entertainments.

Three cases were cited to me. They do not in my view carry the case very far. None of them I think can be cited as covering the case before me. There is first the case of *Attorney-General* v. *McLeod* (1), relating to a festival of Freemasons, consisting partly of a dinner and partly of a concert, where Roche J. said this (2): "The language of contract is not apt in connection with these festival arrangements, but, however the matter of contract may stand, I am clearly of opinion that if money is paid in the expectation that it will secure admission to a concert, and it does in fact secure such admission, entertainments duty is payable."

Then there was the case of the Essex County Cricket Club: *Attorney-General* v. *Swan* (3), where Roche J. held that the subscriptions of the members of the Essex County Cricket Club securing, as they did, admission as spectators to the cricket matches played on the county ground, were subscriptions within the section. Roche J. says there (4): "The contention of the Attorney-General and the true construction of the subsection seem to me to be this: that if in fact people pay a sum of money for admission to an entertainment, then entertainments

(1) [1918] 1 K. B. 13.
(2) Ibid. 21.
(3) [1922] 1 K. B. 682.
(4) Ibid. 687.

duty is payable, notwithstanding that the payments are made in the form of subscriptions to a club."

Lastly, there is the case of the Hurlingham Club: *Attorney-General* v. *Valentia.* (1) That case went to the Court of Appeal and there it was held, following the decision of Roche J. in *Attorney-General* v. *Swan* (2), that entertainments duty was chargeable on a portion of the subscriptions payable to the Hurlingham Club, those subscriptions covering among other things the right to view polo matches, which were entertainments. Warrington L.J. dealt with the point of the privileges of members of the club and of the loss of those privileges if there was a failure to pay the subscription. The distinction, of course, between *Attorney-General* v. *Valentia* (1) and this case is obvious, but if the view which I take of the facts in this case is right it is not a distinction which really ought to affect the result. The distinction, of course, is that a member of the Hurlingham Club was able to attend and view the polo, if he wanted to do so, simply as the result of having paid his subscription. Here a member of this club who wishes to attend and view a theatrical entertainment cannot do so merely as the result of paying a subscription to his club; he is obliged to purchase a ticket of admission to enable him to do so. I do not think Mr. King's argument about only looking at the proximate payment will do. I think the truth of the matter is this. When a member of this club—whether an associate member or a full member—attends a theatrical entertainment, he attends it not only because he has purchased a ticket but because he has paid a subscription which gives him the right to purchase the ticket; and having by the payment of the subscription acquired the right to purchase a ticket, he exercises the right by purchasing a ticket. Now that seems to me to get over the point so well and forcibly put by Mr. King that the theatrical entertainments paid for themselves as the result of the fees charged for entry to them. That I think has really nothing to do with the matter. The point is whether the payment made for admission to an

(1) 41 Times L. R. 78.

(2) [1922] 1 K. B. 682.

entertainment was made in part by means of a lump sum paid as a subscription. The analogy of the Oxford college does not seem to be close, because I think that no one would say that the fees paid in respect of the education or presumed education of the members of the college were paid in respect of admission to an entertainment, even though incidentally there might be one. I should think that a case of that sort would be decided upon facts differing so widely from this that it has little if any bearing, even as an illustration. The question is, I think, largely one of fact. I treat it as being one of fact, though I have been guided by the principles laid down in the three cases to which my attention has been called.

I think that upon the facts of this case my decision must be that the contention of the Attorney-General is right. No question of figures arises before me at all. It is very undesirable, in case any dispute should arise, that I should say anything whatever about them, and I do not propose to say anything about them. I simply say, therefore, that in my opinion, taking the view which I do, I must direct that judgment should be entered for the Crown for the sum of 115*l*. against the defendants.

Judgment for Crown.

R. F. S.

The defendants appealed. The appeal was heard on November 11 and 14, 1932.

A. S. Comyns Carr K.C. and *Cyril King* for the appellants. Sect. 1 of the Finance (New Duties) Act, 1916, created entertainments duty, and the question arises whether the appellants are liable to duty under sub-s. 4 of that section. It is important to notice that the words of the sub-section are "where the payment for admission to an entertainment is made by means of a lump sum" and not "is made partly by means of a lump sum." It is submitted that the words of the sub-section do not cover the facts of the present case. The appellants admit that they are liable to pay entertainments duty on the price of admission to the theatre, but they contend that they are not liable to pay over part of the yearly subscriptions as entertainments duty.

The cases already decided on this Act and referred to by Finlay J. in the Court below are not, it is submitted, applicable to the facts of this case. They were *Cordiner* v. *Stockham* (1); *Attorney-General* v. *Swan* (2); *Attorney-General* v. *Valentia* (3); *Attorney-General* v. *McLeod* (4); *Gibson* v. *Reach.* (5)

It cannot, it is submitted, be inferred that any part of the subscriptions to this club is in respect of a payment for admission to an entertainment within the words of the statute. Further, although sub-s. 4 makes taxable a lump sum paid as a subscription to any club for the right of admission to a series of entertainments and deals with the apportionment in a case where the payment of a lump sum represents payment for other privileges, rights or purposes besides the admission to an entertainment, yet it nowhere deals with a case such as this where the payment for the entertainment is made separately.

[LORD HANWORTH M.R. The payment of the subscription, it is true, confers no right of admission to the theatre of the club, but the persons who are entitled to have an opportunity of gaining admission to the theatre are the members of the club only. That right given to members to obtain a ticket for the theatre is a privilege which attaches to membership of the club. Let us look at *Attorney-General* v. *Valentia.* (3)]

In that case the whole cost of the entertainment was provided out of the funds of the club and the members paid nothing for admission. The distinction between the present case and all the other cases is that here the members pay the whole cost of the entertainment when they buy their tickets of admission to the theatre, and on the price of those tickets the duty is paid.

[LAWRENCE L.J. Before you have a right of admission to the theatre there are two conditions which must be complied with: (1.) you must be a member and have paid your subscription to the club and (2.) you must pay for the entertainment.]

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(1) [1920] 1 K. B. 104.
(2) [1922] 1 K. B. 682.
(3) 41 Times L. R. 78.
(4) [1918] 1 K. B. 13.
(5) [1924] 1 K. B. 294.

Before any right of taxation arises the first half of sub-s. 4 of s. 1 must be considered and it must be shown that the payment for admission is by means of the lump sum, and when that is so, which it is not in this case, if the lump sum includes something besides the payment for admission, the Commissioners under the second part of the sub-section are to make an apportionment. The second half of the sub-section is by way of an exception on the first half; but even if that is not so, in both cases what is referred to is the payment for admission, and not part of that payment.

Admission to the theatre is confined to members because, as the theatre is open on Sundays, it is desired that the entertainments should be private and not public. There is no finding that the theatre is kept up by club as a whole or that any part of the subscription in fact covers any part of the cost of providing the entertainment. A member's subscription is not a payment for admission to the theatre, because in order to obtain admission he has to pay a sum of money which, together with the sums paid by other members, is calculated to be sufficient to defray the cost of the entertainment.

[LAWRENCE L.J. Is it not a question of fact for the Commissioners whether the price charged for admission to the theatre is not lower than it would be if there were no subscriptions to the club payable?]

The finding in fact was that the prices of admission covered the whole yearly cost of the shows and the theatre. If that is so, it would be unnecessary to decide whether the Commissioners have rightly drawn the inference that any part of the subscription is in respect of admission to the theatre. Clause 1 of sub-s. 3 read with sub-s. 6 shows clearly that the duty is charged in respect of each person admitted physically as a spectator at some entertainment, but sub-s. 4 protects the Revenue against a case where there is not physical admission and gives a right to deal with a thing like a season ticket. In other words, sub-s. 4 does not enlarge the charge of tax imposed by s. 1; it does not extend it to any wider region. Therefore if sub-s. 4 can on the one hand be regarded as preventing the Revenue from being deprived of their duty, as, for example, in the case of a payment to a club for a season ticket and on the other as a protection to the taxpayer because he is enjoying something other than the right to view the spectacle, the entertainment which is the basis of the charge, it would be right to say that the sub-section does not in any way enlarge the scope of the charge.

[LORD HANWORTH M.R. You may have a case in which two payments are made, one when you get your ticket at the box office, and the other to secure the right to take that ticket. Both payments are payments for admission.]

Only one, it is submitted, would be a payment for admission to the entertainment.

If there is here any doubt as to the construction of the section that doubt should be resolved in favour of the taxpayer: *Gurr* v. *Scudds.* (1)

Sir Boyd Merriman S.-G. and *Bowstead* for the Crown. The Commissioners charged the subscription of the associate members of 10*s*. with one-third of that amount because they considered them to be the key to the association, as, although they obtained very restricted rights with regard to the club, they nevertheless enjoyed the same rights as full members in respect of the theatre. Associate members desired to belong to the club only with a view of obtaining admission to the theatre. If the appellants' arguments were to prevail then to evade duty the price of admission might be made one penny only, and thus the Act would be nullified in this case.

None of the cases touches this point, except *Attorney-General* v. *Valentia* (2), which entirely supports the Crown's contention. There is here more than one element in the payment for admission, for unless the subscription to the club is paid a member cannot obtain admission to the theatre. The club premises may be regarded as the entrance hall to the theatre into which a member must enter before he can obtain admission to the theatre.

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(1) (1855) 11 Ex. 190.

(2) 41 Times L. R. 78.

[They were stopped.]

Comyns Carr K.C. replied.

LORD HANWORTH M.R. This appeal fails. It has involved an interesting argument, which has been well presented to the Court by Mr. Comyns Carr and Mr. King.

By the Finance (New Duties) Act of 1916 a new duty was imposed on payments for admission to entertainments. It was a tax imposed ad valorem. By s. 1 it was declared: "There shall" (from the date specified) "be charged, levied and paid on all payments for admission to any entertainment" an entertainments duty. By sub-s. 3 of that section it was enacted "Entertainments duty shall be charged in respect of each person admitted for payment, and, in the case of admission by stamped ticket, shall be paid by means of the stamp on the ticket, and, in the case of admission otherwise than by stamped ticket, shall be calculated and paid on the number of admissions." That is the simple case, and one must bear in mind that the charge is direct, and it is levied and paid on all payments for admission.

Sub-s. 4 dealt with certain more complex payments. The first part of sub-s. 4 deals with the case where a lump sum is paid for a series of entertainments, a lump sum paid before the entertainments have taken place, before the opportunity of admission to those entertainments has arisen; but never mind; if a lump sum is paid it is subjected to tax, and the right of admission to the series of entertainments draws to it the imposition of the tax which is to be estimated and paid, indeed, although the owner of the right never exercises that privilege and never goes near to the entertainment at all.

Another case which is quite separate is provided in the latter part of sub-s. 4. It is introduced by the word "but." It is wholly separate from the case to which I have referred where a lump sum is paid for a series of entertainments. It is a case where you find that there has been a payment of a lump sum; a composite sum which embraces privileges, rights and purposes besides the admission to an entertainment. Where you find that a lump sum has been paid under such circumstances, the Commissioners are entitled to disintegrate the composite sum paid, and to consider the several privileges, rights and purposes for which the composite payment has been made, and, if they find that in this disintegrated sum there is a payment to be made for admission to an entertainment, then the Commissioners may set aside all those portions of the composite sum which are properly appropriated to privileges, rights and purposes other than admission to an entertainment, and leave those parts of the composite sum untaxed. But the duty shall be charged on such an amount as appears to the Commissioners to represent any payment for the right of admission to entertainments in respect of which entertainments duty is payable. As Romer L.J. has pointed out, one must read in between the words "represent" and "the right" the three words "any payment for," because no sum of money can represent a right of admission. One must read the words as if they stood "such an amount as appears to the Commissioners to represent any payment for the right of admission." When one reads the section in that way one has a clear declaration that the Commissioners are to split up a composite sum, to leave on one side the payments which are made for the privileges, rights and purposes other than admission to an entertainment, and the duty is to be charged and collected by them on such an amount as appears to them to represent any payment for the right of admission. But it is said: "Unless you have the whole and complete right of admission no tax can attach." It is perhaps of use to call attention to the definitions in sub-s. 6 only for this purpose (for the one to which I am going to refer does not apply to the present case) that when defining the expression "admission," and so on, the definition does indicate that there may be cases where there are successive payments made for admission to the ultimate source of enjoyment of the spectator. It connotes something more than one single payment, and, more than that, going back to the charging section, s. 1, sub-s. 1, the tax is to be levied and paid on all payments for admission. It does not exclude successive payments for admission.

Now I come to the facts of this case, having made those observations generally about the statute. In the present case we are dealing with a club called the Arts Theatre Club. It is a club which has premises at 6 and 7 Newport Street. It has a fully equipped modern theatre with an auditorium built with stalls, circles and boxes to accommodate some 350 persons. Then it has on the ground floor a lounge hall, and it has at a lower level a theatre foyer and buffet and theatre cloak-rooms. On the first floor of these premises are situated the club cloak-rooms and a large lounge ; on the second floor dining-room, grill-room and kitchen, and, on the third floor, a dining-room, with the result that, while a compact portion of the premises, separated from the rest by doors, provides a fully equipped modern theatre, the rest of the structure provides premises in which the ordinary purposes of a social club can be fulfilled.

Taking the data that we have, we find that for the nine months from January to September of 1931 there were 965 full members at a higher fee, or a gross total of full members at varying fees of something like 1650 or thereabouts. There were 1752 associate members who pay only 10*s.* The associate members have a limited right of user of the premises. They were permitted to use certain portions, the ground floor of the club premises, which includes the lounge, and the writing rooms there, the inquiry office, and the foyer of the theatre, where light buffet luncheons and teas are served, and where the telephone is, and in those places to enjoy the amenities of the club ; but they could not go either to the first floor or to the second floor, where is the dining-room, and so on, nor to the third floor dining-room. Their right was a limited right.

What was the value of an associate membership ? The associate members had a privilege which belonged to the full members, and that was that they were able to go into the theatre whenever there was a play or production in the theatre, provided that they, like the full members, paid their proper quota for the seats which they engaged. We are told that the price for the seats was so calculated as, in the course of a year, and throughout each year, to pay for the cost of the productions. That obviously connotes that the prices of the tickets for the seats varied from time to time. With a very full house for a particular performance there might be a balance carried over to the next production; with a sparse house at another production there might possibly be a deficit carried to the next production; but if the success, greater or less, of the productions is estimated for, the probability is that there would be some variation in the price of the tickets.

Who could get the tickets? No member of the public could get a ticket. The privilege of obtaining a ticket exclusively belonged to the associate and full members. The reason of it is that the club was founded for the purpose of having a private theatre outside, and excluding, the powers of the Lord Chamberlain and his censorship of plays and for excluding the dangers of the attachment of the Copyright Acts. Bearing in mind that, as has been presented to us with force, each of the members pays for his actual seat which he has obtained when he goes to an entertainment, the question arises, is that payment for that admission to the theatre the only price which the member has paid when he sits down in his seat to watch one of these productions? It would seem that the reason why he joined the club, in many cases, particularly in the case of the associate members, and the value of membership to him, was that he should enjoy the privilege and right to secure admission, by a further payment, to the theatre. In other words, when he reached the theatre he had made two payments: an aliquot part of his subscription and the direct payment for the particular place which he chose in the theatre.

It is said upon those facts that it is not possible that the charge should attach, because the attachment in the second part of sub-s. 4 refers to a payment for admission, not to a part payment for admission. But I have already called attention to the fact that the duty is charged upon all payments for admission to any entertainment, and that in the case of entertainments for which admission is by ticket, or by passing through a turnstile, there are particular methods of collecting the tax. When I come, therefore, to consider whether this second part of sub-s. 4 is excluded, because it does not say "a part payment for the right," I think it is proper to bear in mind the passages to which I have referred which have indicated that there may be payments of different sorts, and, indeed, as in the interpretation section, successive payments in respect of the admission.

Going back then to the second part of sub-s. 4 I find the words "where the Commissioners are of opinion that the payment of a lump sum" (in the present case that would be the subscription to the club) "represents payment for other privileges, rights or purposes besides the admission to an entertainment . . . . the duty shall be charged on such an amount" (that is, of this composite payment) "as appears to the Commissioners to represent [a payment for] the right of admission." In other words, the Commissioners are charged with the duty of breaking up this lump sum to see whether there was contained in it a sum which represents any payment for the right of admission, and, if it does, then a tax falls to be paid. Subsequently, or successively, there may have been a direct payment for the ticket which is used by the member, but not less has he paid the totality of the two sums because he had paid the first sum in a portion of his subscription, and a second portion directly in the purchase of his ticket.

For these reasons it appears to me that the tax does attach, and that the appeal fails, and must be dismissed with costs.

LAWRENCE L.J. I agree. Sub-ss. 1 and 3 of s. 1 of the Act deal with a duty leviable upon all payments made for what I may term specific performances, such as payments made for tickets for admission to a particular play, or such as are paid on going through a turnstile into a place of general entertainment. In those cases the duty is charged in respect of each person admitted to the entertainment. If admitted by ticket the duty is to be stamped on the ticket. If admitted by payment of cash the proprietor responsible for the entertainment has to account to the Revenue for the number of persons admitted. In fact, in the present case the duty is chargeable on the price paid by each member for the right to attend any specific performance given at the club.

Sub-s. 4, however, deals with a different kind of subject-matter—namely, with a lump sum payable by way of subscription to a club, or for a season ticket, or for the right of admission to a series of entertainments, or for the right of admission to any entertainment during a certain period of time. In other words, it is dealing with a lump sum prepayment made irrespective of any particular entertainment but conferring the right to attend any entertainments that might be given during the period covered by the payment. In those cases it is obvious, and so appeared to the Legislature, that the payment might include some other privileges, rights and purposes besides the right of admission to the entertainment. Particularly is that so in the case of clubs. Therefore, by the latter part of the section the Commissioners were charged with the duty in such cases of dissecting the subscription to the club, or the other lump sum payable, and of finding out whether any, and what, part of it represented the right of admission to an entertainment.

It is said here (and this seems to me the sole point in the case) that unless the Commissioners are able to find that the part so dissected covers the whole right of admission to the entertainment, then the proprietor is not taxable in respect of any part of the subscription to the club. In my view that is not the right construction of the section. It is obvious that under the earlier parts of the Act, sub-ss. 1 and 3, the payment for admission may be by two or three, or more sums. It is the totality of the sums paid for admission which determines the amount of duty payable. So, in the case of a subscription to a club, it may very well be that each member of the club is charged some additional sum for admission besides that proportion of this subscription which represents his right as a member to attend the entertainment, and I think the aggregate of what he so pays by way of subscription and by way of price of admission is the sum which is taxable under the Act. It has been strenuously argued by Mr. Comyns Carr that the words in the Act do not permit of such a construction, but, I think, if they are carefully considered they do bear the meaning which I have expressed. The latter part of the section enacts that, if the Commissioners are of opinion that the payment of a lump sum represents a payment for other privileges besides the admission to an entertainment (that must mean, I think, "besides the right to admission to an entertainment") "The duty shall be charged on such an amount as appears to the Commissioners to represent the right of admission to entertainments." As an amount cannot strictly speaking represent the right of admission the words must be construed to mean "to represent a payment in respect of the right of admission"; in other words, the Commissioners have to ascertain which part of the subscription represents a payment in respect of the right of admission, and the part so ascertained when added to the price charged to the member for admission to any specified performance represents the total payment made by him for admission to the entertainment. So far from doing any violence to the language of the section I think that the construction which I have indicated is the natural construction of the words used, though perhaps their purport might have been better expressed.

For these reasons I agree that the appeal fails, and ought to be dismissed.

ROMER L.J. I agree. For the reasons that have been given by my Lords, I am of opinion that the second part of sub-s. 4 should be read as follows: "Where the Commissioners are of opinion that the payment of a lump sum or any payment for a ticket represents payment for other privileges, rights or purposes besides the right of admission to an entertainment" (leaving out words immaterial for the present purpose) "the duty shall be charged on such an amount

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as appears to the Commissioners to represent a payment for the right of admission to entertainments in respect of which entertainments duty is payable." The price paid for admission to an entertainment may consist of several sums of money paid at different times, and at different places. Each one, in my opinion, is rightly described as a payment for admission, or for the right of admission, and those payments when added together constitute the payment for admission or the right of admission. Now as in the present case there was abundant evidence on which the Commissioners could form the opinion, as they did, that the subscriptions paid by full members and associate members did include, or represent, a payment for the right of admission to the entertainment within the meaning of sub-s. 4, it follows that the sub-section is applicable.

Appeal dismissed.

Solicitors for appellants: *Bartlett & Gluckstein.*
Solicitor for Crown: *Solicitor for Customs and Excise.*

W. I. C.

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Nov. 14, 15.

HIMLEY ESTATES, LIMITED, AND HUMBLE INVESTMENTS, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Income Tax—Super-tax—Provision to prevent withholding Distribution of Income of Company—To what Companies applicable—Company under the Control of not more than Five Persons—Finance Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21, *sub-s.* 6—*Finance Act*, 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 31.

A private company was formed with the object of acquiring an interest in the estate of a tenant for life under certain family settlements. Its nominal capital was 2000*l.* divided into 1000 ordinary shares of 1*l.* each and 1000 preference shares of 1*l.* each, there having been issued and fully paid 50 ordinary shares and 700 preference shares. The 50 ordinary shares had all along been held by the tenant for life. Of the 700 preference shares fourteen persons had acquired 50 each and had continuously held them except one who had transferred his shares to the now holder of them. The holders of the preference shares acquired them with their own moneys and were beneficial holders of them. None of them was under any agreement as to the manner in which he should use the voting powers attached to his shares. The tenant for life personally guaranteed to the preference shareholders the capital value of their shares and the dividends thereon, and in return these shareholders undertook not to dispose of their shares without first giving the tenant for life the opportunity to purchase them. The Articles of Association provided that the directors might issue the shares to such persons and on such terms as they thought fit; that seven days' notice was to be given of all the company's meetings, and that the general nature of all special business must be notified to the company in advance; and that all shares carried equal voting rights. There had been only two directors of the company since its incorporation—namely, the tenant for life and a member of the firm of solicitors who acted for him:—

Held (by Rowlatt J. and the Court of Appeal), that the company was not under the "control" of not more than five persons within the meaning of the Finance Act, 1922, s. 21, sub-s. 6, as amended by s. 31 of the Finance Act, 1927, either as being under the control of the tenant for life alone or of him and his co-director jointly.

The terms of the definition clause before the Court censured as unintelligible and ridiculous.

Case stated for the opinion of the High Court by the Board of Referees pursuant to the Finance Act, 1922, First Schedule, para. 2.

1. At a meeting of the Board of Referees held on December 9, 1930, for the rehearing of appeals under para. 2 of the First

Schedule of the Finance Act, 1922, the Board reheard appeals by Himley Estates, Ld. (hereinafter called "Himley"), and Humble Investments, Ld. (hereinafter called "Humble"), against directions made by the Special Commissioners of Income Tax on October 9, 1929, under s. 21 of the Finance Act, 1922, whereby they directed that for the purposes of assessment to super-tax the income of Himley for the year ended March 31, 1928, and the income of Humble for the year ended December 8, 1928, should be deemed to be the income of the members, and the amounts thereof apportioned among the members thereof as therein directed.

The two companies, being aggrieved by these directions, appealed against them to the Special Commissioners who, upon hearing the appeals and after taking oral evidence on March 26, 1930, determined that the directions should be discharged.

The Commissioners of Inland Revenue, being dissatisfied with that determination, required the appeals to be reheard by the Board of Referees, who reheard them accordingly.

2. The only question for consideration by the Board of Referees was whether or not Humble was a company to which s. 21 of the Finance Act, 1922 (1), as amended by s. 31

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(1) Finance Act, 1922 (12 & 13 Geo. 5, c. 17). Sect. 21: "With a view to preventing the avoidance of the payment of super-tax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted as follows:

(1.) Where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period ending on any date subsequent to the fifth of April, nineteen hundred and twenty-two, for which accounts have been made up, distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super-tax, a reasonable part of its actual income from all sources for the said year or other period, the Commissioners may, by notice in writing to the company, direct that for purposes of assessment to super-tax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members:

"Provided that, in determining whether any company has or has not distributed a reasonable part of its income as aforesaid, the Commissioners shall have regard not of the Finance Act, 1927, applied, it being agreed that (i.) if Humble was such a company, it had not distributed a reasonable part of its actual income for the year ended March 31, 1928, (ii.) in the same event the two directions dated October 9, 1929, given by the Special Commissioners ought to stand, and (iii.) if Humble was not such a company such directions ought to be discharged.

The question of the application of the section to Humble depended upon the answer to the question whether Humble was a company "under the control of not more than five persons." If it was such a company the section applied; if it was not the section did not apply.

3. No oral evidence was called before the Board, but the following facts were admitted:—

(*a*) Himley, whose registered office was at Dudley, was incorporated at the instance of Viscount Ednam as a public company on March 31, 1926, with a nominal capital of 10,100*l.* divided into 100 preference shares of 1*l.* each and 10,000 ordinary shares of 1*l.* each.

(*b*) The objects of Himley, as stated in the Memorandum of Association, were to acquire lands and investments by purchase or otherwise.

(*c*) Himley on its formation acquired from Viscount Ednam under two agreements dated April 1, 1926, and April 3, 1926,

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only to the current requirements of the company's business but also to such other requirements as may be necessary or advisable for the maintenance and development of that business."

"(6.) This section shall apply to any company—

(*a*) which has, since the fifth day of April, nineteen hundred and fourteen, been registered under the Companies Acts, 1908 to 1917; and

(*b*) in which the number of shareholders computed as hereinafter provided is not more than fifty; and

(*c*) which has not issued any of its shares as a result of a public invitation to subscribe for shares; and

(*d*) which is under the control of not more than five persons.

For the purposes of this subsection— . . . .

A company shall be deemed to be under the control of any persons where the majority of the voting power or shares is in the hands of those persons or relatives or nominees of those persons, or where the control is by any other means whatever in the hands of those persons . . . ."

respectively, considerable assets for 499,960*l.*, payable as to 10,000*l.* in cash on April 1, 1926, as to 479,960*l.* by annual instalments of 16,000*l.*, and as to the balance of 10,000*l.* by the issue of 10,000 ordinary shares of 1*l.* each of Himley, credited as fully paid up, which were issued to Viscount Ednam or his nominees.

(*d*) The assets above referred to consisted of :—

(i.) The life interest under family settlements of the Earl of Dudley, the father of Viscount Ednam, which had previously been purchased by Viscount Ednam ;

(ii.) Viscount Ednam's reversionary life interest under the said settlements ;

(iii.) the benefits of certain policies of insurance on the life of Viscount Ednam himself.

(*e*) The issued capital of Himley was 56 preference shares held by fifty-six different persons and the said 10,000 ordinary shares.

(*f*) By the Articles of Association of Himley (article 70) Viscount Ednam was appointed a director until he should die or resign, and, in fact, he had been sole governing director since the incorporation of Himley. By article 62 the chief voting rights were attached to the ordinary shares.

(*g*) The actual income of Himley for the year ended March 31, 1928, computed in accordance with s. 21 of the Finance Act, 1922, had not been settled, but it was agreed that on the assumption that s. 21 of the Finance Act, 1922, as amended by s. 31 of the Finance Act, 1927, applied to Himley, a reasonable dividend within the meaning of those sections had not been declared in respect of the year ended March 31, 1928.

(*h*) Humble, whose registered office was situate in Gray's Inn, in the county of London, was incorporated as a private company on December 8, 1927, with a nominal capital of 2000*l.* divided into 1000 ordinary shares of 1*l.* each and 1000 preference shares of 1*l.* each, carrying the right to a cumulative preferential dividend of 10 per cent. free of tax ; there having been issued and fully paid 50 ordinary shares and 700 preference shares.

(*i*) The objects of Humble, as stated in its Memorandum of Association, were of a similar character to those of Himley.

(*j*) The 50 ordinary shares of Humble had throughout been held by Viscount Ednam.

(*k*) The preference shares of Humble had throughout, with one exception, been held by the following persons :—

	Name.	Occupation.	No. of shares.
1.	The Duke of Sutherland	Peer of Realm	50
2.	Brigadier-General the Hon. Robert White	Gentleman	50
3.	P. Dudding	Estate agent	50
4.	W. L. Ainslie	Solicitor	50
5.	O. J. Humbert	do.	50
6.	J. W. Trowsdale	Manager of steel works	50
7.	W. A. B. Hatton	Assistant do.	50
8.	J. A. Bailey	do. do.	50
9.	E. J. Wilkes	Director of colliery co.	50
10.	P. Braddon	Solicitor	50
11.	G. J. Stringer	Solicitor's clerk	50
12.	H. E. Jewkes	Assistant estate agent	50
13.	E. Jennings	Married woman	50
14.	C. Wiss	Solicitor's clerk	50

The exception referred to was that the shares belonging to C. Wiss were transferred to him by Mr. C. E. Stredwick, a retired solicitor, on July 17, 1928.

(*l*) The respective holders of the preference shares acquired their shares with their own moneys and were the beneficial holders of their shares. None of them were under any agreement as to the manner in which they should use the voting powers attached to their shares.

(*m*) By divers instruments of guarantee Viscount Ednam personally guaranteed to each of the preference shareholders of Humble the capital value of their shares and also the dividends payable thereon, in return for which guarantee the preference shareholders undertook that they would not sell, mortgage or otherwise dispose of their shares without first giving Viscount Ednam the opportunity to purchase them.

(*n*) In the Articles of Association of Humble it was provided: (article 4) that the directors might issue the shares of Humble to such persons and on such terms and conditions as they thought fit; (article 61) that seven days' notice at the least was to be given to members in respect of the time and place of all the company's meetings, and the general nature of all special business to be transacted must be notified to the company in advance; (article 62) that all business except that which was purely formal was regarded as special; (article 74) that all shares carried equal voting rights; (article 84) that no qualification was necessary for any director; (article 89) that the business of the company was to be managed by the directors subject to the articles and regulations (not being inconsistent with the articles) given by the company in general meeting; (articles 95–102) that the directors were subject to retirement by rotation and to removal by extraordinary resolution.

(*o*) Humble on December 27, 1927, acquired from Viscount Ednam at par value 9950 of the 10,000 ordinary shares of 1*l*. each previously held by him in Himley. Apart from this investment Humble had no other investments except a nominal holding in War Loan. Humble had no cash available for the purchase of these shares at the time they were bought, but paid for them out of the dividend subsequently declared by Himley for the year ended March 31, 1928.

(*p*) The actual income of Humble for the year to December 8, 1928, computed in accordance with s. 21 of the Finance Act, 1922, had not yet been settled. But it was agreed that, on the assumption that s. 21 of the Finance Act, 1922, as amended by s. 31 of the Finance Act, 1927, applied to Humble, a reasonable dividend within the meaning of those sections had not been declared in respect of the year ended December 8, 1928.

(*q*) There had been only two directors of Humble since its incorporation—namely, Viscount Ednam and O. J. Humbert, a member of the firm of Messrs. Taylor & Humbert who were Viscount Ednam's solicitors.

O. J. Humbert was the member of that firm who was engaged in the formation of Humble.

5. It was contended on behalf of the Commissioners of Inland Revenue that the control of Humble was in the hands of not more than five persons, because it was in the hands of Viscount Ednam or of Viscount Ednam and O. J. Humbert jointly in that :—

(*a*) Viscount Ednam and O. J. Humbert, as directors of Humble, could at any moment in their own discretion issue to one of themselves or their nominees the remaining 950 ordinary shares and 300 preference shares in Humble, thus giving the majority of the shares voting power and undisputed control to themselves or their nominees as the allottees of these shares ;

(*b*) any action proposed to be taken by one or more of the preference shareholders adverse to Viscount Ednam's interests, as for example removing him from his office as director or substituting another person in his place, would require that notice should be given in accordance with the Articles of Association, which would enable Viscount Ednam singly or jointly with O. J. Humbert to take such action as was indicated under (*a*) above and so defeat the action proposed;

(*c*) Viscount Ednam was substantially the only person interested beneficially in the two companies.

6. It was contended on behalf of Himley and Humble that :—

(*a*) the control referred to in the section did not mean the powers of management of the affairs of the companies vested in the directors ;

(*b*) the control referred to was legal control existing in fact at the relevant period ;

(*c*) no such legal control or control in fact existed in five persons or less;

(*d*) the shareholding to be considered was the holding of shares in fact issued and not the possible holding of shares which might be issued ;

(*e*) both the power to determine whether or not unissued shares were to be issued and the power to determine to whom were to be issued any shares determined to be issued were fiduciary powers vested in the directors, and any exercise of those powers for the purposes suggested by the Commissioners would be bad in law;

(*f*) there was no evidence from which the fact of control in five persons or less could be inferred;

(*g*) the determination of the Special Commissioners discharging the said directions was right and ought to be affirmed.

7. The Board of Referees found as a fact that Humble was under the control of not more than five persons, and they accordingly reversed the determination of March 26, 1930, and determined that the directions of October 9, 1929, should be restored.

8. Immediately upon the determination of the appeals upon rehearing the companies declared their dissatisfaction therewith as being erroneous in point of law, and in due course required the Board to state a Case for the opinion of the High Court pursuant to the Finance Act, 1922, First Schedule, para. 2, which Case they stated and signed accordingly.

9. The question of law for the opinion of the Court was whether there was evidence upon which the Board could properly come to the conclusion aforesaid.

A. M. Latter K.C. and *A. Andrewes-Uthwatt* for the appellants.

Sir Thomas Inskip A.-G., *J. H. Stamp* and *R. P. Hills* for the Crown.

Cur. adv. vult.

March 22. ROWLATT J.: The question in this case, to come at once to the point, is whether Humble Investments, Ld., one of the appellant companies, is under the control of not more than five persons within the meaning of the Finance Act, 1922, s. 21, sub-s. 6, as amended by the Finance Act, 1927, s. 31.

It is contended by the Crown that it is under the control of Viscount Ednam, or of Viscount Ednam and one Humbert, who are its only directors, jointly. This contention was rejected by the Special Commissioners after hearing oral evidence. It was, however, accepted on appeal by the Board of Referees, who dealt with the matter on admitted facts which are stated in the Case upon which the point comes before us.

The company is a private company with a nominal capital of 2000*l.* in 1000 1*l.* ordinary shares and 1000 1*l.* preference shares. Of these there have been issued and fully paid 50 ordinary shares held by Viscount Ednam, and 700 preference shares held in blocks of 50 each by fourteen persons named in the Case. These preference shares, which carry a preferential 10 per cent. tax free dividend, and are guaranteed as to both principal and interest by Viscount Ednam, were acquired by their respective holders out of their own moneys and are beneficially their property. None of the holders were under any agreement as to how they should use the voting powers attached to the shares. All the shares carry equal voting rights. Viscount Ednam is therefore in a minority of one to fourteen.

Under the Articles, which I need not rehearse in detail, it would be in the power of the directors to issue the shares at present unissued, or so many of them as might be necessary, to themselves or their nominees, and so secure a preponderance of voting strength, and this circumstance was relied upon before the Board of Referees—and it seems to have been the main contention—as showing that the directors had the other shareholders de facto in their hands. In the argument before me, Mr. Stamp very properly declined to put forward this argument, as the procedure indicated would be unsustainable in point of law.

The only other contention stated to have been put forward before the Board of Referees in support of the conclusion that the company was under the control of not more than five persons was that Viscount Ednam was substantially the only person interested beneficially in the appellant companies, Humble Investments, Ld., and its subsidiary, Himley Estates, Ld. There is nothing stated in the Case amounting to the slightest evidence that

Viscount Ednam, either alone or in conjunction with his co-director, could in any way constrain any of the other fourteen shareholders in the exercise of their voting rights. There is perhaps abundant material from which it might be inferred that he could rely upon their willing co-operation de facto, but that does not seem to me to be evidence of control in its literal sense either legal or moral, which, I think, involves power in some shape, not merely reliance.

The question now is whether the case can be brought within the definition in the last paragraph of sub-s. 6, which was as follows: "A company shall be deemed to be under the control of any persons where the majority of the voting power or shares is in the hands of those persons or relatives or nominees of those persons, or where the control is by any other means whatever in the hands of those persons . . . ." The object of that seems to me clear—namely, to add, but without thereby limiting the general word, certain cases where control is artificially to be deemed to exist, though it does not or may not exist in fact.

To begin with, possession of the majority of the shares, divorced from the voting power, is to be deemed arbitrarily a medium of control. But the clause goes on most unfortunately to introduce, in the same sentence, an entirely different matter—namely, what is meant to be an artificial system of counting the possessors. It ends by referring to "control by any other means whatever." "Other," as used in this connection, is a bewildering word. The argument for the Crown was that control as here used must be wide enough to embrace the instances already given, and that that would be wide enough to include this case. I regret that I am unable to do justice to the argument by a more precise statement. I cannot see by what ambit this extension is to be limited. In my judgment control, apart from the artificial instances specifically mentioned, means actual control.

I cannot leave the consideration of this clause without pointing out that it calls loudly for redrafting in the interests of precision. I venture to give one illustration of many that have occurred to me of its defects. Suppose a majority of the shares are in the hands of six brothers. The control would appear, within the meaning of the first part of the clause, to be deemed to be in the hands of those persons. But the Revenue, I understand, deny this, contending that it is deemed to be in the hands of any five, or any smaller number, because the others are relatives. Why stop here? The brothers may have parents who may, it is true, have nothing to do with the company, but why is the company not under the control of the parents? The majority of the shares are in the hands of their relatives within the very words of the enactment. This was not meant, and is, of course, ridiculous, but the truth is that the draftsman has not observed what he has been writing, and has construed the words in accordance with some ill-defined conception floating in his own brain. Really this important clause ought not to be allowed to remain in this unscholarly and bewildering form.

This appeal must be allowed, and the decision of the Special Commissioners restored with costs.

Appeal allowed.

J. R.

The Crown appealed. The appeal was heard on November 14, 15, 1932.

Sir Thomas Inskip A.-G., *J. H. Stamp* and *R. P. Hills* for the Crown.

A. M. Latter K.C. and *A. Andrewes-Uthwatt*, for the respondents, were not called upon to argue.

Lord Hanworth M.R. At the outset of our judgment in this case I should like, on behalf of my colleagues and myself, to associate myself with the words which were used by Rowlatt J. when he pointed out that "this clause calls loudly for redrafting in the interests of precision." That observation is not intended to make any reflection upon the original draftsman of the Act; we all know the heavy task that is laid upon draftsmen, particularly at this time, when the output of bills and statutes is so large. It may well be that the clause was very different when it left the draftsman's hands; but no one can look at the clause without seeing that it needs revision, and that, as it stands, it is almost hopeless to construe. I would not have used these terms again, had it not been that these observations could have been applied to the case we decided yesterday and a number of cases which come before us, particularly on the construction of the Finance Acts.

I turn now to this case which comes on appeal from Rowlatt J. I need not recapitulate the facts. The question that we have to determine is whether or not the Humble company was under the control of not more than five persons within the meaning of s. 21, sub-s. 6, of the Finance Act, 1922. Sub-s. 6 says: "This section shall apply to any company . . . . (*d*) which is under the control of not more than five persons" and which is not a subsidiary company or a company in which the public are substantially interested. There are fifteen shareholders in this company, and numerically it is impossible to hold that the company is "under the control of not more than five persons," unless it is possible, by means of an interpretation clause, to get rid of some of those shareholders. It is said that for the purposes of the sub-section one must look to and apply the words: "A company shall be deemed to be under the control of any persons where the majority of the voting power or shares is in the hands of those persons or relatives or nominees of those persons, or where the control is by any other means whatever in the hands of those persons." I quite agree with what Rowlatt J. said about the word "other," that is found there: and I have already, in the argument, said a word or two about the meaning and interpretation to be placed upon the words "those persons." Applying one's best powers to this interpretation clause, the company is to be deemed to be under the control of any persons first of all where the majority of the voting power is in the hands of

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those persons. In the present case the majority of the voting power is not in five, but in a larger number of persons. The next alternative is: "Where the majority of the voting power or shares is in the hands of those persons or relatives or nominees of those persons." That sub-clause is inapplicable, because it has been found in the Case that these respective holders of the shares acquired their shares with their own moneys, and were the beneficial holders of their shares, and they cannot be reduced to a number of not more than five, by reason of their being relatives or nominees. Then comes the thirdly of this clause: "Or where the control is by any other means whatever in the hands of those persons." The Attorney-General said that we could cast aside the ejusdem generis rule, on the ground that we find the word "whatever" in this part of the clause. It is true that that word is found, but it is in reference to the "any other means," and not with regard to the word "control"; in fact, this limb, after the clause has been dealing with the case where there is the possession of a majority of the shares divorced from voting power, once more reverts to the use of the word "control," re-establishing the meaning of "control," I think, as the exercise of a power given by the Articles of Association. In this limb, therefore, you have once more to look at where is the control as given by the Articles of Association, and see whether that is "by any other means in the hands of those persons," whatever that may mean; but it seems to indicate that you may find a case where the voting power is in the hands of persons who are subservient, by some means, to another person. It is quite true that the measure and value of these other means is a question of fact to be dealt with by the Commissioners who state the Case and who reheard the Case; but once they have estimated the facts, they must be such as to indicate that by virtue of those other means, the control, that is to say, the exercise of the authority given under the Articles of Association, is in the hands of those persons. Whatever may be the estimate given by the Commissioners in respect of the influence that might be exercised in the present case by the original founder of the company, in response to feelings of gratitude, or it may be of fear or of reluctance to act ungratefully, or otherwise, one still has to see whether those " other means " are such as to prevent the exercise of the proper functions entrusted by the Articles of Association to the shareholders. That is not so, and that has not been found, and the control still remains a control which belongs to these fourteen persons. For these reasons it appears to me that the judgment of Rowlatt J. was right upon the interpretation of the section, and that the original decision of the Special Commissioners, who determined the case after taking the oral evidence, ought, as Rowlatt J. held, to be restored and supported. The appeal must be dismissed with costs.

LAWRENCE L.J. I agree. Notwithstanding the courageous attempt made by Mr. Stamp to defend the wording and the substance of the relevant portions of sub-s. 6 which we have to consider, for myself I have been quite unable to understand them. If you take sub-s. 6 (*d*) with the appended definition clause literally, it would prima facie seem that where once you find that more than five persons have the majority of the voting power, there is an end to the question, because the sub-section in terms applies only to a company which is under the control of not more than five persons. The definition clause says : " A company shall be deemed to be under the control of any persons where the majority of the voting power or shares is in the hands of those persons" ; therefore, I should have thought that if the voting power is in the hands of more than five persons, then it is not a company to which the sub-section applies. But the Attorney-General and Mr. Stamp have contended that the control by voting power is only one of the alternatives given in the definition clause, and that you may have a company which, although under the control of more than five persons, owing to the voting power being in more than five persons, is yet under the control of not more than five persons by some other means : a difficult position to imagine, but that is the contention here. I agree

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with what the Master of the Rolls has said as to the meaning of the main words which we have been asked to construe. The relevant part of the sub-section (when read as we were invited to do by the Attorney-General and Mr. Stamp omitting all words not relevant to this case) reads in this way: "A company shall be deemed to be under the control of any persons, where the control is by any means in their hands." That seems to me a somewhat ridiculous definition, but taking it for what it is worth, it means at most this: that you have to find out whether the control is in fact in the hands of not more than five persons; the means by which that control is given may be "any means." For myself, I cannot see how any means other than legal means can give the control of a company to less than five persons: be it by voting power, be it by shareholding or be it by a contract contained in the Articles of Association, or by contract outside the Articles, or by fiduciary relationship. There may be many means by which a control in fact may be given to a shareholder or group of shareholders so as to vest the control of the company in less than five persons; but in the present case, there is no statement whatever in the Case which would warrant the Court in drawing the inference that the control is in not more than five persons. The Articles are in the ordinary form; the Case in no way suggests that the fourteen preference shareholders are not free to exercise their voting powers as and how they please; the only suggestion that counsel have made is that all the preference shareholders are subservient to Lord Ednam, who was the promoter of the company and is one of its directors. It is also stated that the only other director is Lord Ednam's solicitor, who helped in the formation of the company. Be it so. There is not a word in the Case which would lead to the inference that this solicitor would not do his duty as a director, both to the company as a whole, and to his co-shareholders individually. He is not, in any sense, under the control of Lord Ednam, though Lord Ednam may very well have selected him to be his co-director. It is further suggested that because by the Articles it is left to the discretion of the Board to allot shares to such persons as it shall think fit (this company being a private company where no public issue is to be made) all the shareholders selected by the Board are in some way under the control of the Board after the shares have been allotted to them. I decline to draw, and I do not think any tribunal would be justified in drawing, any such inference. Really, when you come to look at this case there is no sort of foundation for the finding that Lord Ednam has the control of this company in the sense in which that word is understood by lawyers and should be construed in the sub-section. I agree with the reasons given by the Master of the Rolls and by Rowlatt J., and for those reasons, as well as the reasons which I have given, I agree that the appeal should be dismissed.

ROMER L.J. It appears that there are 750 issued shares in this company, held by fifteen persons. Any group of eight of those persons holds a majority of the shares and the voting power, for each share carries the same right of voting; therefore, according to the Act, the control of this company is deemed to be in each of those groups of eight of which there are, of course, a great number; some 6435 in fact. It is said that applying this quite ridiculous clause (the definition clause) the control of the company is to be also deemed to be in the hands of Lord Ednam. Supposing that were so, in my opinion it would be a wholly immaterial circumstance once it has been found that the control is to be deemed to be in the hands of more than five persons. In these circumstances the section of the Act can have no application. For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Taylor & Humbert.*

W. I. C.

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H. COLLIER AND SONS, LIMITED (IN LIQUIDATION) *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Sur-tax—Company under the Control of not more than Five Persons—Sale of Undertaking—Sale to take effect retrospectively from end of last Year for which Company's Accounts made up—Voluntary Winding-up—Income for Broken Period to Date of Winding-up Resolution—Direction that Income to be deemed Income of Members for purposes of Sur-tax—Finance Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21, *sub-s.* 1—*Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 31, *sub-s.* 4.

A company was incorporated in February, 1908, as a private company, and the principal shareholders on the material dates did not exceed five in number. By an agreement dated November 16, 1928, the company agreed for the sale of its assets and undertaking to a purchasing company. By clause 8 of the agreement it was provided that possession of the assets and undertaking of the company should be retained by it up to completion on or before December 15, 1928, and that from August 31, 1928, the date up to which the annual accounts of the company were made up, the company should be deemed to be carrying on the business on behalf of the purchasing company, and should account and be entitled to be indemnified accordingly. On December 20, 1928, the company went into voluntary liquidation:—

Held (affirming Finlay J.'s decision), that notwithstanding the provision in clause 8 of the agreement, the income of the company between September 1 and November 16, 1928, was under the Finance Act, 1922, s. 21, sub-s. 1, and the Finance Act, 1927, s. 31, sub-s. 4, income of the company for the period from September 1 to December 20, 1928, available for distribution to the members of the company which the Special Commissioners for the Purposes of the Income Tax Acts had rightly directed should be deemed, for the purpose of assessment to sur-tax, income of the members of the company to be apportioned among them.

Per Lord Hanworth M.R. and Slesser L.J.: The provision in s. 21, sub-s. 1, of the Act of 1922, giving the Special Commissioners power so to direct only in respect of "a reasonable part of the actual income," is a limitation of the power which has no application to the income for a period ending on the date of a winding-up resolution or order, having regard to the provision in s. 31, sub-s. 4, of the latter Act that income of the period should be "deemed to be income available for distribution to the members of the company" and to the inapplicability to a period so ending of the considerations to be taken into account in fixing the reasonable part under the proviso to s. 21, sub-s. 1, of the Act of 1922.

APPEAL from a decision of Finlay J. on a case stated by the Board of Referees pursuant to the Finance Act, 1922, First Schedule, para. 2. The case raised questions as to the income of H. Collier & Sons, Ld. (in liquidation) (hereinafter called "the company"), for the year ending August 31, 1928, and for the broken period from September 1, 1928, to December 20, 1928. The appeal from Finlay J. relates only to the income of the latter period, and the case is only set out so far as material for that purpose.

At a meeting of the Board of Referees held at the Royal Courts of Justice on June 2, 1931, for the purpose of rehearing appeals under para. 2 of the First Schedule to the Finance Act, 1922, we, members of the said board present at the said meeting, reheard an appeal by the company, whose registered office is at 46 Basinghall Street, London, E.C. 2, against directions made by the Commissioners for the Special Purposes of the Income Tax Acts on October 18, 1929, under s. 21 of the Finance Act, 1922, whereby they directed that for the purposes of assessment to sur-tax the actual income from all sources of the company should for (inter alia) the period ended December 20, 1928, be deemed to be the income of the members of the company, and the amount thereof should be apportioned among the members of the company.

On the rehearing before us of the said appeal the following facts were admitted or proved:—

(*a*) The company was incorporated on February 28, 1908, under the Companies Acts, 1862 to 1900, as a private limited company with an authorized capital of 6000*l.*, divided into 6000 shares of 1*l.* each, with the object (inter alia) of carrying on the business of manufacturers of motor cycles. The company went into voluntary liquidation on December 20, 1928.

(*b*) The nominal capital of the company has been increased from time to time, and is now 100,000*l.* divided into 25,000 preference shares of 1*l.* each, and 75,000 ordinary shares of 1*l.* each. 59,220 1*l.* ordinary shares have been issued and are fully paid up, and of these shares 30,987 have been issued for cash, the balance—namely, 28,233, having been issued to the shareholders in 1920, when the company capitalized 28,233*l.* of its undivided profits.

(*c*) The company had also issued first, second, and third mortgage debentures. At August 31, 1928, the following debentures were outstanding—namely :—

50 6½ per cent. first mortgage debentures of 100*l*. each	5000*l*.
6½ per cent. second mortgage debentures . .	3000*l*.
14 10 per cent. third mortgage debentures of 250*l*. each	3500*l*.

(*d*) The principal shareholders at August 31, 1928, and December 20, 1928, were as follows :—

August 31, 1928.	1*l*. ordinary shares.
Executors of H. H. Collier, deceased . .	11,547
Mr. H. A. Collier	8,800
Mr. C. R. Collier	8,800
Executors of S. H. Turner, deceased . .	21,027
E. C. Parkell	8,842
December 20, 1928.	
Mr. D. Kerman	59,020
Mr. H. A. Collier	100
Mr. C. R. Collier	100

Messrs. H. A. Collier and C. R. Collier were joint managing directors from 1925.

(*e*) From 1920 to 1928 the company expended over 18,000*l*. in the extension, renewals, and replacement of buildings, plant, and machinery. After the war a considerable portion of the pre-war buildings were rebuilt, as the original structures were unsuitable for the most efficient manufacture.

(*f*) The profit and turnover for the years from 1920 to 1928 were as follows :—

	Profit. £	Turnover. £
Year to August 31, 1921 .	14,027 .	270,158
,, ,, 1922 .	10,002 .	181,303
,, ,, 1923 .	3,535 .	142,197
,, ,, 1924 .	10,113 .	219,024
,, ,, 1925 .	10,320 .	204,647
,, ,, 1926 .	10,097 .	187,894
,, ,, 1927 .	11,397 .	214,483
,, ,, 1928 .	40,500 .	394,194

For the year ended August 31, 1927, the export trade covered 30 per cent. of the turnover of 214,483*l*., of which 10 per cent. represented new customers. For the year ended August 31, 1928, export trade covered 35 per cent. of the turnover of 394,194*l*., of which 38 per cent. represented new customers. For the year ended August 31, 1927, a dividend of 7½ per cent. was declared, but payment was postponed, and was ultimately made in November, 1928.

(*g*) The net profit for the period ended August 31, 1928, was 40,500*l*., subject to income tax, but no dividend was declared in respect of this period. The liabilities and assets of the company at the said date, as shown in the balance sheet, were :—

Liabilities.	£	*s.*	*d.*
Issued capital	59,220	0	0
6½ per cent. first mortgage debentures, with interest	5,043	6	8
6½ per cent. second mortgage debentures, with interest	3,026	0	0
10 per cent. third mortgage debentures, with interest	3,546	13	4
Sundry liabilities	6,589	3	8
Sundry trade creditors	11,065	8	4
Dividend declared 29–3–28 unpaid . .	3,553	4	0
Profit and loss account	73,730	12	9
	£165,774	8	9

Assets.	£	*s.*	*d.*
Freehold land and buildings . . .	51,713	6	2
Furniture and fittings	455	10	11
Plant and machinery	23,463	18	1
Matchless Hire Purchase Sales, Ld. . .	398	0	0
Stock	27,576	9	7
Goodwill	10	0	0
Sundry assets and payments in advance .	2,180	16	3
Loans on mortgage	850	0	0

ASSETS—*continued.*	£	*s.*	*d.*
Sundry debtors	20,482	2	4
Bills receivable	4,835	9	6
5000*l.* 4½ per cent. Conversion Stock . .	4,903	8	6
Cash	28,905	7	5
	£165,774	8	9

(*h*) By an agreement dated November 3, 1928, and made between the said H. A. Collier and the said C. R. Collier of the one part and David Kerman of the other part, it was agreed that the parties of the first part should sell and transfer, or cause to be sold and transferred, the whole of the issued shares of the company to the said David Kerman in consideration of the sum of 165,000*l.* This agreement was entered into pursuant to a scheme for the formation of a public company to carry on the business of the company. It was a term of the agreement that the parties of the first part should subscribe in cash for 165,000 shares of 5*s.* each in the new company.

(*i.*) By an agreement dated November 16, 1928, and made between the company of the one part and Matchless Motor Cycles (Colliers), Ld. (therein called "the purchasing company"), of the other part, it was agreed that the company should sell to the purchasing company all its freehold premises, plant and machinery, stocks, letters patent and trade marks, undertaking and goodwill, trading contracts and engagements and all other assets.

By clause 2 of this agreement it was provided that the company should retain all its cash in hand and at bank (less the sum of 3533*l.* 4*s.*, the amount of a dividend declared prior to August 31, 1928), 5000*l.* 4½ per cent. Conversion Stock, bills receivable, and all book debts due to the company as at August 31, 1928.

By clause 5 it was provided that the consideration for the sale should be 165,000*l.*, to be satisfied by the allotment to the company of 660,000 shares of 5*s.* each in the capital of the purchasing company credited as fully paid up.

By clause 8 it was provided that possession of the assets and undertaking of the company should be retained by the company up to completion (i.e., up to or before December 15, 1928) and that as from the close of the business on August 31, 1928, the company should be deemed to be carrying on the said business on behalf of the purchasing company, and should account and should be entitled to be indemnified accordingly.

(*k*) By an agreement dated November 16, 1928, and made between the company of the one part and Dulcia Securities Trust, Ld., of the other part, the company sold to the party of the second part 640,000 shares of 5*s*. each in the capital of Matchless Motor Cycles (Colliers), Ld., at the price of 6*s*. per share.

Shortly after the date of the last mentioned agreement Dulcia Securities Trust, Ld., offered 560,000 of the shares therein mentioned to the public.

(*l*) No accounts of the company for the period ended December 20, 1928, were made up, but for income tax purposes the profits of Matchless Motor Cycles (Colliers), Ld., have been apportioned on a time basis, liability in respect of the period from September 1, 1928, to November 15, 1928 (the date on which the business changed hands), falling to be met by the company. These accounts show that a profit of 44,649*l*. 3*s*. 3*d*. was made for the said year. No dividend was declared by the company in respect of the period from September 1, 1928, to December 20, 1928.

At the rehearing of the appeal evidence was given by (amongst others) Mr. H. A. Collier. Mr. Collier stated that in the view of the directors the position of the company in 1925 was precarious, requiring the building up of reserves and the expansion of the export trade, that the company found a new outlet for its products in the expansion of the export trade, and that the export trade during the year ended August 31, 1928, was more than twice that of the year ended August 31, 1927, while the supplies to new customers amounted to 53,546*l*. as compared with 7000*l*. in the year ended August 31, 1927.

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It was contended on behalf of the company (inter alia) :—

(*a*) That as regards the period ended December 20, 1928, in consequence of the terms of the agreement dated November 16, 1928, between the company and Matchless Motor Cycles (Colliers), Ld., there was no income of the company for that period which could be deemed to be income of that period available for distribution within the meaning of s. 31, sub-s. 4, of the Finance Act, 1927.

(*b*) That the determination of the Special Commissioners should be reversed, and the direction for the period December 20, 1928, discharged.

It was contended on behalf of the Crown (inter alia) :—

(*a*) That the profits made by the company between September 1, 1928, and November 15, 1928, were, for the purposes of s. 21 of the Finance Act, 1922, and s. 31 of the Finance Act, 1927 (1), income of the company for the period from September 1, 1928, to December 20, 1928.

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(1) The Finance Act, 1922, s. 21, provides :—

With a view to preventing the avoidance of the payment of supertax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted as follows :

(1.) Where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period . . . . for which accounts have been made up, distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of supertax, a reasonable part of its actual income from all sources for the said year or other period, the Commissioners may, by notice in writing to the company, direct that for purposes of assessment to supertax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members :

Provided that, in determining whether any company has or has not distributed a reasonable part of its income as aforesaid, the Commissioners shall have regard not only to the current requirements of the company's business but also to such other requirements as may be necessary or advisable for the maintenance and development of that business."

The Finance Act, 1927, s. 31, sub-s. 4, provides :—

" Where an order has been made or a resolution passed for the winding up of a company to which the said section twenty-one applies, the income of the company for the period from the end of the last year or other period for which accounts of the (*b*) That the company went into voluntary liquidation on December 20, 1928, and that the year ended August 31, 1928, was the last year for which accounts of the company had been made up; that under s. 31, sub-s. 4, of the Finance Act, 1927, the income of the company for the period from September 1, 1928, to December 20, 1928, was for the purposes of s. 21 of the Finance Act, 1922, deemed to be income of that period available for distribution to the members of the company, and that as respects that period the said s. 21 applied as if the words "within a reasonable time" in sub-s. 1 of the said s. 21 were omitted therefrom.

(*c*) That the company had not distributed a reasonable part of its income in the manner described in s. 21 of the Finance Act, 1922, for the period from September 1, 1928, to December 20, 1928.

(*d*) That the directions made by the Special Commissioners under s. 21 of the Finance Act, 1922, in respect of the income of the company for the period from September 1, 1928, to December 20, 1928, should be confirmed.

We, the members of the Board present at the said meeting, dismissed the said appeal and confirmed the directions made by the Special Commissioners on October 18, 1929.

The questions of law for the opinion of the Court are:—

(*a*) Whether the profits made by the company for the period from September 1, 1928, to November 15, 1928, were for the purposes of s. 21 of the Finance Act, 1922, and s. 31 of the Finance Act, 1927, income of the company for the period ended December 20, 1928?

(*b*) Whether the income of the company for the period ended December 20, 1928, is for the purposes of s. 21 of the Finance Act, 1922, to be deemed to be the income of the company available for distribution among the members of the company?

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company have been made up to the date of the order or resolution for winding up shall, for the purposes of the said section, be deemed to be income of that period available for distribution to the members of the company, and, as respects that period . . . ., the said section shall apply as if the words 'within a reasonable time' in sub-section (1) of the said section were omitted therefrom."

(*c*) Whether s. 21, sub-s. 1, of the Finance Act, 1922, applied in respect of the period ended December 20, 1928, as if the words "within a reasonable time" were omitted therefrom ?

(*d*) Whether there was evidence upon which we could hold that the company had not distributed a reasonable part of its income for the period ended December 20, 1928, in the manner described in s. 21 of the Finance Act, 1922 ?

Finlay J. said that under s. 31, sub-s. 4, of the Finance Act, 1927, the income of the company from the end of the last year to which accounts were made up down to the date of the winding-up resolution was for the purposes of the section to be deemed to be income available for distribution to the members of the company. That did not in his view mean more than that it was income to which, if the other conditions of that section and s. 21 of the Act of 1922 were fulfilled (that is, if there had been what might be called the unreasonable withholding of it), the appropriate machinery might be applied. It was contended that there was no income of the company to which it could be applied; but up to November 15, 1928, the company was carrying on business on its own behalf, and it mattered not what sale it chose to make after that date.

That left only the question whether there was evidence upon which the Board of Referees could arrive at the conclusion they did. He thought that there was ample evidence, as there was nothing to suggest that a balance-sheet as at November 16, 1928, or December 20, 1928, would not have disclosed a position quite as favourable as that which the four balance-sheets had disclosed. For these reasons the appeal must be dismissed.

The company appealed. The appeal was heard on November 16 and 17, 1932.

Roland Burrows K.C. and *Braund* for the appellant company. By the agreement of November 16, 1928, the whole income of the company commencing from September 1, 1928, was sold. The position for the purposes of s. 21 of the Act of 1922 and s. 31 of the Act of 1927 has to be considered at the end of the period in question, and on that date the company had no income for the period from September 1, 1928, to December 20, 1928. How then can it be said that there was income which ought reasonably to have been distributed to the members? The Crown make no claim, except in respect of the income earned between September 1, 1928, and November 15, 1928, and contend that during that period the company was carrying on business and earning profits, and that by no subsequent sale can the position be altered that there were for that period undistributed profits. The answer to this is that the relevant questions under the sections have to be answered as at December 20, 1928, and that the company had then no income and could, therefore, have no income which ought to have been distributed to the members.

[Slesser L.J. Is not s. 31, sub-s. 4, of the Act of 1927 directly applicable to the income in question, because by that sub-section the income is to be "deemed to be income of that period available for distribution to the members of the company"?]

Even if that were so, the question would still remain, under s. 21 of the 1922 Act, what was a reasonable part of that income to be distributed? After the sale of the income it could not be said that any part of it was reasonably distributable. This really is the appellant company's second contention that no part of the income was unreasonably withheld from the shareholders, having regard to the fact that it had been sold before the date when the matter fell to be considered: compare *Glazed Kid, Ld.* v. *Inland Revenue Commissioners*. (1) It cannot be reasonable to distribute what you have no power to distribute. Finlay J. has failed to take into account that before the end of the period in question the company had no distributable income—indeed, no income at all. The words in s. 31, sub-s. 4, of the Act of 1927, stating that the income for the period from the end of the last year for which accounts of the company have been made up to the date of the winding-up resolution is to be "deemed to be income of that period available for distribution," does not make it the less necessary to see what part of that income could reasonably be distributed having regard to the considerations mentioned in the proviso to s. 21, sub-s. 1, of the Act of 1922.

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(1) (1930) 15 Tax Cas. 445, 456, 457.

Sir T. Inskip A.-G. and *Reginald Hills* for the Commissioners were not called upon.

Lord Hanworth M.R. This case involves a question of the construction to be put upon s. 21, sub-s. 1, of the Finance Act, 1922, which has been amended by s. 31 of the Finance Act, 1927. [His Lordship stated the facts.] No question arises in the present appeal about tax down to the close of the financial year ended on August 31, 1928, or about tax on income accruing after the agreement of November 16, 1928. It is accepted on the part of the revenue authorities that, from and after the time when this agreement was entered into, it may be taken that any profits made by the company were profits of the purchasing company; for present purposes, whatever may be the liability of any person in respect of those profits, they are not in suit in the present case. What is claimed is that, inasmuch as the company is one to which the sections to which I have referred apply, there were in fact profits being made from September 1 down to November 16 which were profits that ought to be deemed profits made by the company, and, if so, that as they had not been distributed they are within sub-s. 1 of s. 21. That sub-section gives a power to the Special Commissioners, where it appears to them that any company to which that section applies has not, "after the end of any year or other period ending on any date subsequent to the fifth day of April, nineteen hundred and twenty-two, for which accounts have been made up, distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super-tax, a reasonable part of its actual income from all sources for the said year or other period, the Commissioners may, by notice in writing to the company, direct that for purposes of assessment to super-tax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members." It is claimed by the Crown that in this case the Special Commissioners were right in holding that they were entitled to include in the return for super-tax falling to be paid by each member of the company an aliquot part of the undistributed profit, which was earned between the time when the last of the accounts was made up and the time when the purchasing agreement was entered into. It is claimed that such profit as accrued to the company during that period was for all practical purposes a profit which if the company had gone on would have been distributed, or ought to have been distributed in the ordinary course. It will be observed that s. 21, sub-s. 1, does not deal with the case where a company has been wound up, and in the case of this company the winding-up resolution was passed on December 20, 1928. That matter is, however, dealt with by s. 31 of the Finance Act, 1927, and sub-s. 6 provides that: "The income apportioned to a member of a company for the period from the end of the last year or other period for which accounts have been made up to the date of the order or resolution for winding-up shall, for the purposes of super-tax, be deemed to have been received by him on the date of that order or resolution." So every member of this company, who is assessed to super-tax in respect of undistributed profits of a company by virtue of the powers granted to the Special Commissioners must be treated as having received the sum which would stand to his credit as undistributed profits on the date of the winding-up resolution. Further, sub-s. 4 of the section provides: "Where an order has been made or a resolution passed for the winding-up of a company to which the said section twenty-one applies, the income of the company for the period from the end of the last year or other period for which accounts of the company have been made up to the date of the order

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or resolution for winding-up shall, for the purposes of the said section, be deemed to be income of that period available for distribution to the members of the company." Now we have in this case a company to which s. 21 applies, a resolution passed for the winding-up of the company on December 20, and, applying the words of s. 31, sub-s. 4, simpliciter, the income of the company from August 31, 1928, to the date of the resolution for winding-up—December 20—is for the purposes of s. 21 "deemed to be income of that period available for distribution to the members of the company." That is an explicit statement of the Legislature that the profits between those two dates are to "be deemed to be income of that period available for distribution to the members of the company." What, therefore, is there which would prevent the power of the Commissioners attaching to the income of that period? It is said that we must go back to s. 21, which, as it stood originally, made provision for the case where a company had not "within a reasonable time after the end of any year or other period . . . . distributed to its members . . . . a reasonable part of its actual income," and in the proviso it was laid down that "in determining whether any company has or has not distributed a reasonable part of its income as aforesaid," regard is to be had "not only to the current requirements of the company's business but also to such other requirements as may be necessary or advisable for the maintenance and development of that business."

It is said that those considerations introduce a number of factors which disturb the simple direction under which the income for the period in question is to be treated as income available for distribution to the members of the company. It is argued that no one can say, except the directors, what was the right course to adopt, what was a reasonable provision for the maintenance and development of that business. I have come to the conclusion that, in the case where there has been a winding-up order or resolution, we are bound by the direct and simple words of s. 31, sub-s. 4. In such a case the income of the company is to "be deemed to be income of that period available for distribution to the members

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of the company," and the section explicitly eliminates in such a case the words "within a reasonable time." The effect of taking out those words is that you get a hard and fast terminus ad quem, to which regard is to be had. You are not to allow a period during which there can be a determination whether the company shall or shall not divide a reasonable part of its actual income. I think the elasticity originally given by s. 21, sub-s. 1, in regard to the part of the profits which was reasonably distributable, has also been eliminated. The proviso states the consideration to be taken into account "in determining whether any company has or has not distributed a reasonable part of its income as aforesaid"—that is, a reasonable part of its actual income determined within a reasonable time. Sect. 21, sub-s. 1, deals not merely with a reasonable time limit, but with a reasonable part of the company's income with a reasonable provision for the maintenance and development of its business. Then s. 31, sub-s. 4, of the later Act expressly eliminates in a case where there has been a winding-up any latitude with regard to time. and I think that where such facts obtain, as in the present case, then the whole income of that period is to be deemed to be available for distribution to members of the company. There may be good reason for this. In any event we have, in my judgment, to bear in mind the terms of the amending section, the elimination of the reasonable time, and the direction that the income of the company down to the particular date from the last making up of the accounts is to "be deemed to be income of that period available for distribution to the members of the company." No such words as the words "available for distribution" had appeared in the previous section. Those words are introduced for the first time; they are words applicable to something that is not necessarily proper income for distribution, but is to be deemed to be the income for distribution. In my opinion, those words in sub-s. 4 are so direct that it excludes the possibility of the latitude asked for by the appellant company in this case. For these reasons the appeal fails and must be dismissed with costs.

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Slesser L.J. I have come to the same conclusion. The whole matter which has here to be considered falls, in the first place, under s. 31, sub-s. 4, of the Act of 1927, for there is no doubt that this is a company concerning which a resolution had been passed for its winding-up voluntarily. The question which I ask myself is whether the language of that sub-section being, as it is, an amendment of s. 21 of the Act of 1922, must be read as containing in itself an express direction as to what is to be done in such a case as the present, or whether there are certain elements, and if so, what elements, to be read into that sub-section from the Act of 1922, of which this is an amendment.

As my Lord has pointed out, the language of sub-s. 4 of s. 31 is express. [His Lordship read the sub-section.] If the words, " income of that period available for distribution to the members of the company," are to be read in their ordinary and natural meaning, without any reference to any earlier statute, the direction is clear. Given a period between the time when the accounts were made up and the period of the winding-up resolution, the income of the company is to be deemed to be income of that period available for distribution. Therefore, whatever the ascertained income is, it is to be deemed the income available for distribution amongst the members, and so liable to the incidence of super-tax as provided in the Act of 1922.

The difficulty arises in this way. As I have said, the sub-section of the Act of 1927, to which I have referred, is an amendment of s. 21, sub-s. 1, of the Act of 1922, and that sub-section, after allowing a reasonable time for distribution to members by the company, a provision which, so far as regards a period terminated by a winding-up resolution or order, has been repealed by the Act of 1927, goes on to speak of the company having failed to distribute, "in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super-tax, a reasonable part of its actual income." Therefore, under the Act of 1922 the Special Commissioners, when they act, have, for the purpose of getting at the notional figure by which the respective incomes of members is to be treated as increased for purposes of super-tax, to consider what is a reasonable part of its actual income for distribution; and there is a proviso to that section saying that "in determining whether any company has or has not distributed a reasonable part of its income . . . . the Commissioners shall have regard not only to the current requirements of the company's business but also to such other requirements as may be necessary or advisable for the maintenance and development of that business." Of course, in the case of a company which is under sentence of death by reason of a voluntary resolution or compulsory order for winding-up, the question of requirements for the maintenance and development of the business does not arise; and those matters which have to be taken into consideration under s. 21, sub-s. 1, of the Act of 1922, do not seem appropriate. Further, the words, "income available for distribution to the members," do not occur in the Act of 1922 for the reason, as I think, that the Legislature was there dealing only with that part of the income which was deemed to be a reasonable part ascertained as in that section provided. I ask myself, therefore, whether there is any possibility between the total income being available for distribution among the members on the one side, and on the other side a reasonable part only of the income being so available after taking into account the current requirements of the business and what may be required for the maintenance and development of that business. It might well be that a reasonable part of the income would be ascertainable with regard to the particular matters to be considered in the proviso to sub-s. 1 of s. 21. I find considerable light on that matter in the amendment to that sub-section passed in the Act of 1927 by s. 31, sub-s. 1, which is, so far as is here material, to this effect: "Subsection (1.) of section twenty-one of the Finance Act, 1922, shall have effect as if at the end thereof there were added as a new paragraph the following:—'For the purpose of this subsection any such sum as is hereinafter described shall be regarded as income available

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for distribution among the members of the company,' " using precisely the same language as that which is used in sub-s. 4 of s. 31 : " and not as having been applied or being applicable to the current requirements of the company's business or to such other requirements as may be necessary or advisable for the maintenance and development of that business." That points to a complete and exhaustive antithesis between the income being available for distribution among members of the company on the one hand, and money applied to the requirements of the company's business or requirements for maintenance and development of the business on the other hand. If that be a right view, and it is consistent with and supports the other views which the Master of the Rolls has expressed, it follows that, when the statute of 1927 speaks of " income available for distribution to the members of the company," it is an express provision that the ascertained income shall be deemed to be available for distribution, regardless of whether it is a reasonable part within the meaning of the earlier Act.

There remains one other question which I do not propose to decide in this case ; I do not think it is necessary. Mr. Burrows has put to us the case that, even on a winding-up, it may be that, by reason either of some private contractual obligation or some public provision, it would be unlawful to distribute part of the income. He says that, for that reason, the question what is a reasonable part must be treated as still open for consideration, notwithstanding the fact that there is no business still to be maintained or to be developed. I think the answer may be that, in such a case, such income would not be available for distribution at all in law and, therefore, would not fall within sub-s. 4. As I say, I do not think it is necessary to consider that point in this case. I have given judgment in this case at some length, because I am conscious of the fact that the considerations by which I have arrived at my decision are not quite the same as those which moved the learned judge in the Court below. He seemed to be of opinion that the Commissioners must still consider what was a reasonable part of the income for distribution under the Act of 1927, and decided the case, as I understand him, as a question of fact. Because I have arrived at a different view of the law on that matter, and agree with the Master of the Rolls in thinking that the words of sub-s. 4 are to be read in the sense which I have indicated, I have thought it right in courtesy to the learned judge to give full expression to my opinion.

Romer L.J. In my opinion the words of sub-s. 4 of s. 31 of the Finance Act, 1927, are too strong for Mr. Burrows, and constrain us to dismiss this appeal.

According to the plain words of that sub-section, applied to the facts of this case, the income earned by the company between September 1 and November 15 inclusive in the year 1928 is to be deemed, for the purpose of sub-s. 1 of s. 21 of the Finance Act, 1922, income of the company for the period ending on December 20, 1928, available for distribution amongst its members. It is said by Mr. Burrows—and, as at present advised, I think there is a great deal to be said for his contention—that, in point of fact, the income was not available for distribution among the members on December 20, apart altogether from the fact that there was a winding-up, inasmuch as on November 16 that income had been sold to the company that purchased the whole of the company's business as a going concern; but, nevertheless, the sub-section says that it is to be deemed to be income of the company available for distribution amongst its members. That being so, all we have to consider is whether it was open to the Board of Referees to come to the conclusion that a reasonable part of that income had not been distributed to the members. As the income is to be deemed to be income available for distribution to the members, and on that hypothesis there was no conceivable reason why the income should not have been distributed amongst the members, it is clear that the Commissioners could find, as they did in fact find, that it was unreasonable not to have so distributed it; in other words, that a reasonable part of that income had not in fact been distributed amongst the members. That is sufficient to dispose of

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this case, and I express no opinion whatever as to some of the other points that have been argued. In particular I express no opinion as to what would have been the result if, instead of going into liquidation on December 20, the company had continued to exist as a holding company—that is, a company holding shares in the purchasing company—up to August 31, 1929. I can see that interesting questions would then arise and, in particular, the question whether sub-s. 1 of s. 21 of the Finance Act, 1922, is not dealing solely with income which is, in fact, available for distribution amongst its members, or has to be regarded as income so distributable by reason of the amendment made to that sub-section by sub-s. 1 of s. 31 of the Finance Act, 1927.

For the reasons I have given I agree that this appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Forsyte, Kerman & Phillips; Solicitor of Inland Revenue.*

H. C. G.

COMMISSIONERS OF INLAND REVENUE *v.* CLARKSON-WEBB.

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Dec. 19.

Revenue—Surtax—Brothers executing mutual Trust Deeds in favour of Nephews —Income becoming applicable for the Benefit of the Son of each "by virtue or in consequence of any disposition made, directly or indirectly," by his Father—Finance Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 20, *sub-s.* 1 (*c*).

The respondent, O. H. C.-W., on May 28, 1929, covenanted by deed to pay to his brother, W. T. C.-W., an annual sum by half-yearly instalments on trust for the infant son of W. T. C.-W. until either the expiration of seven years from the date of the deed, or the death of O. H. C.-W., or the death of W. T. C.-W., or the death of the infant son of W. T. C.-W., or the death of the infant son of O. H. C.-W., whichever should first happen. By a deed executed on the same date and in identical terms, mutatis mutandis, W. T. C.-W. covenanted to pay to O. H. C.-W. an annual sum of the same amount as that to be paid to him by O. H. C.-W., on trust for the infant son of O. H. C.-W., until the happening of either of the same events.

It was admitted that the respondent would not have made the dispositions made by him for the benefit of his nephew if his brother had not made similar provision for the respondent's own son.

The respondent claimed a deduction from his total income for purposes of surtax of the annual amount paid by him to his brother, and not to bring into charge the amount paid by his brother to him, on the ground that neither of these sums was "income which was payable to or applicable for the benefit of a child of the respondent by virtue or in consequence of any disposition made directly or indirectly by him":—

Held, that the two deeds must be read together as forming one disposition, and that, when they were so read, it became apparent that by making a disposition in favour of his nephew the respondent directly procured the making of a similar disposition in favour of his own son which fell within s. 20 of the Finance Act, 1922.

Assessment upheld, reversing the decision of the Special Commissioners, and respondent's claim disallowed.

CASE stated by the Special Commissioners of Income Tax.

Mr. Oscar Hugh Clarkson-Webb, the respondent, appealed to the Special Commissioners against an assessment to surtax for the year ending April 5, 1931.

By a deed executed on May 28, 1929, the respondent covenanted with his brother, Mr. William Thomas Clarkson-Webb (therein called "the trustee"), to pay the trustee the annual sum of 350*l.* by half-yearly payments commencing on September 30, 1929, on trust for John Peard Clarkson-Webb, the infant son of the trustee, until whichever of the following events should first happen—namely: (*a*) the expiration of seven years from the date of the deed; (*b*) the death of the respondent; (*c*) the death of the trustee; (*d*) the death of the trustee's son, John Peard; or (*e*) the death of the respondent's infant son, Michael Robert.

By a deed executed on the same date the respondent's brother, Mr. William Thomas Clarkson-Webb, covenanted to pay the respondent the annual sum of 350*l.* by half-yearly payments commencing on September 30, 1929, on trust for the respondent's infant son, Michael Robert, until whichever of the same events as mentioned in the respondent's deed should first happen.

A similar pair of deeds, identical in terms with the first pair, except for names and dates, was executed on May 28, 1930, creating trusts for other infant children of the respondent and his brother.

It was admitted by the respondent that the above-mentioned deeds had been executed as a result of mutual arrangements between the respondent and his brother for the protection of their respective infant children against the bankruptcy of their respective fathers, and that the respondent would not have made the disposition made by him for the benefit of his brother's children if his brother had not made the dispositions made by him for the benefit of the respondent's own children.

On or about September 30, 1930, and March 31, 1931, the respondent and his brother each gave to the other cheques for the respective sums covenanted to be paid on those dates, less the appropriate amounts of income tax thereon.

In making his return of total income for the purposes of surtax the respondent claimed a deduction of 700*l.* from the aggregate of his professional and investment income in respect of the annual sums paid to his brother on trust for his nephews, and did not make any reference to the annual sums paid to him by his brother in trust for his own children. The Commissioners who made the assessment disallowed the deduction claimed on the ground that they considered the payments to come within the provisions of s. 20, sub-s. 1 (*c*), of the Finance Act, 1922. (1) The sole question raised on the appeal was whether any of the annual sums paid under the deeds should be deemed for the purposes of surtax to be income of the respondent.

It was contended on behalf of the respondent: (*a*) that neither the annual sums paid by the respondent to his brother on trust for his nephews nor the annual sums paid by his brother to the respondent on trust for his children were income which was payable to or applicable for the benefit of a child of the respondent by virtue or in consequence of any disposition made directly or indirectly by him; (*b*) that s. 39, sub-s. 3, of the Finance Act, 1927, precluded any charge of surtax on the respondent in respect of so much of his profits or gains as was equal to the annual sums paid by him on trust for his nephews; (*c*) that there was no ground on which the annual sums paid to him by his brother on trust for his children could be treated as income of the respondent.

It was contended on behalf of the Crown (inter alia): (*a*) that the dispositions made by the respondent and his brother by mutual arrangement were in each case parts of one indivisible transaction; and having regard to the definition contained in s. 20, sub-s. 5, of the Finance Act, 1922, in each case constituted one disposition; (*b*) that the annual sums paid by the respondent to his brother on trust for his nephews in each case were in substance income applicable for the benefit of the respondent's own children by virtue or in consequence of a disposition made directly or indirectly by the respondent; (*c*) alternatively, that the annual sums paid to the respondent by his brother on trust for the respondent's children were income applicable for the benefit of those children by virtue or in consequence of dispositions made directly or indirectly by the respondent; (*d*) that in view of the provisions of s. 20, sub-s. 1 (*c*), of the Finance Act, 1922, either (1.) the annual sums paid by the respondent to his brother ought not to be allowed as deductions in computing his total income for the purposes of surtax, or (2.) the annual sums paid to the respondent by his brother must be deemed to be income of the respondent and added to his return of total income for the purposes of surtax.

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(1) By s. 20, sub-s. 1, of the Finance Act, 1922: "Any income . . . . (*c*) which by virtue or in consequence of any disposition made, directly or indirectly, by any person after the fifth day of April, 1914, is payable to or applicable for the benefit of a child of that person for some period less than the life of the child; shall, subject to the provisions of this section, but in cases under the above paragraph (*c*) only if and so long as the child is an infant and unmarried, be deemed for the purposes of the enactments relating to income tax (including super-tax) to be the income of the person who is or was able to obtain the beneficial enjoyment thereof, or of the person, if living, by whom the disposition was made, as the case may be, and not to be for those purposes the income of any other person. . . ."

By sub-s. 5: "The expression 'disposition' includes any trust, covenant, agreement or arrangement."

The Special Commissioners held that the annual sums paid by the respondent on trust for his nephews were not applicable for the benefit of his own children, and that they must be allowed as deductions in computing his total income for the purposes of surtax. As regarded the annual sums paid to the respondent by his brother on trust for his children, the Special Commissioners did not consider that they were applicable for the benefit of those children by virtue or in consequence of dispositions made directly or indirectly by the respondent so as to be deemed to be income of the respondent for the purposes of surtax under the provisions of s. 20, sub-s. 1 (*c*), of the Finance Act, 1922. They accordingly allowed the appeal and reduced the assessment.

Sir Boyd Merriman S.-G., *J. H. Stamp* and *R. P. Hills* for the Crown.

C. Montgomery White for the respondent.

FINLAY J. This is a curious case, and a case which I think is not free from difficulty, as is shown by the fact that, on the whole, I have come to a conclusion different from that which was arrived at on the appeal by the Special Commissioners.

It is not necessary that I should state in detail the facts. They can be expressed quite concisely by saying that there were two brothers with two sons, and each brother was, quite properly and naturally, desirous of making provision for his son. There was, subsequently, some further provision for another pair of sons, but nothing turns upon that. The arrangement was carried out by two deeds, and the substance of each deed is this: That A., the first brother, appoints B., the other brother, a trustee, and covenants to pay to B., for the benefit of B.'s infant son, a sum of 350*l.* a year. B., by the other deed, enters into precisely the same arrangement turned round. He makes A. the trustee, and covenants to pay to A. for the benefit of A.'s infant son, the sum of 350*l.* a year. The case has been put throughout with the utmost possible candour; and it obviously could not be denied that this was an arrangement entered into in this sense: that each brother was desirous of making provision for the benefit of his own child; the method by which it was carried out being that in consideration of the first brother making the provision for the benefit of his nephew, the second brother should make precisely the same provision, also for the benefit of his nephew. The result, of course, is precisely the same as if each had covenanted with any trustee, it matters not whom, to make a payment for the benefit of his own son. The result, I say, is the same; but it is, of course, necessary to look at the deeds and to look at the section in order to see whether the Crown have made out the claim to tax in the Case.

I need not, I think, refer any further to the deeds. It is worth while, however, to read paragraph 6 of the Case: "It was admitted by the respondent that the above-mentioned deeds had been executed as a result of mutual arrangements between the respondent and his brother for the protection of their respective infant children against the bankruptcy of their respective fathers, and that the respondent would not have made the dispositions made by him if his brother had not made the dispositions made by him for the benefit of the respondent's children." Paragraph 7 goes on to state that on the appropriate dates each brother handed to the other a cheque for the appropriate amount.

Now, the question depends mainly upon the consideration of s. 20, sub-s. 1 (*c*), of the Finance Act, 1922. [His Lordship read the material words.] There is in sub-s. 5 a definition of "disposition," and by that definition it includes "any trust, covenant, agreement or arrangement." I agree that it must be a document effecting some sort of disposition. Manifestly, the Legislature by saying that "disposition" includes "arrangement" does not make every "arrangement" a "disposition"; but subject to that, the meaning appears to be this, that if in consequence of any disposition (including therein any arrangement effecting a disposition) made directly or indirectly by any person, any income is payable to or applicable for the benefit of a child of that person for some period less than the life of the child, then that income is to be deemed for purposes of taxation to be the income of the person by whom the disposition was made.

Here there is no doubt at all that, if there was a disposition for the benefit of the child, it was for a period less than the life of the child. The whole question, and it is not free from difficulty, is, whether I am entitled to look at the two deeds together. I think I am. Of course, if I am to look only at the deed whereby the respondent covenants to pay the sum of money to his brother for the benefit of the brother's infant son, quite clearly that would not be a disposition for the benefit of his own son. But it seems to me that, when one looks at the facts as they are found, one appreciates that this is part of one transaction and that the respondent by making this provision for the benefit of his nephew, is, as I think, directly procuring the making of a provision precisely of the same amount for the benefit of his own son. I think that I ought to look at the substance of the matter and that I ought to look at these deeds together. It is constantly necessary to look at several deeds to get the true effect of an arrangement. Looking, then, at these deeds together it seems to me to be reasonably plain that this was, in substance, the procuring of an arrangement by the respondent, the arrangement being that he was to provide 350*l.* a year for the benefit really of his own son.

I have no doubt—it is stated in the Case—that the brothers went through what I cannot help regarding as the empty form of handing over cheques. In substance, as they were the trustees, that form does not seem to me to affect the matter. That leads me to say this, that I do not think this case depends upon the fact that the two brothers were the two trustees. The result, I think, would have been the same if the family solicitor or any outsider had been made a trustee. I think Mr. White was right when he pointed out to me that after the deeds the trustees could not possibly be said to be masters of the situation. Before the deeds—and that is the critical thing, I think—they were; after the deeds they were not. But in truth, I do not think that this case turns upon the circumstance that the brothers chose, pursuant to the arrangement which they had made, to appoint themselves as trustees. It would have been the same if they had chosen to appoint anybody else.

The substance of my view is this: that these deeds were "dispositions" within the meaning of the section; they were made by mutual arrangement; and they were part of an arrangement which must be looked at as a whole, with the result that for this purpose they constituted one disposition.

My attention was called to two cases. With regard to the case of *In re Engelbach's Estate* (1) I am not satisfied that that has any close bearing upon the present case. It is not worth analysing it in detail, but its bearing appears to me to be a little remote. It is otherwise with the decision in *In re Jenkinson.* (2) The facts of that case (it is not worth going into them) were widely different from the present case, and it had reference to the Succession Duty Act; but I think that the principle upon which Sir John Romilly M.R. (as he then was) proceeded in that case is of value in the present case, and does tend to support the view which I take.

(1) [1924] 2 Ch. 348.

(2) (1857) 24 Beav. 64.

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Upon the whole case, which is a curious one, and I think rather a difficult one, I think I ought to decide in favour of the Crown, and certainly I do not think it would be questioned that the substance of the matter is in the Crown's favour. Of course, it has been pointed out over and over again (and Mr. White very rightly called my attention to the principle) that, unless the Crown can get the subject within the fair words of the taxing Act, it will not avail the Crown to say that, in substance and on the merits, they have got a good case. There are not any merits about a taxing Act. What I have got to do is to look at the words and to consider whether, fairly read, the Crown bring the case within them. I think that, reading as fairly as I can these words in s. 20, the Crown do succeed in bringing this case within the words, and on that ground, I think that this appeal must be allowed.

Appeal allowed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for the respondent: *Woodbridge & Sons.*

J. W. H.

FRESHWATER *v.* WESTERN AUSTRALIAN ASSURANCE COMPANY, LIMITED.

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Nov. 22.

[1932. F. 1720.]

Insurance—Third Party Risks—Motor Accident—Motorist insured—Accident caused to Third Party—Damages recovered against Motorist by Third Party—Subsequent Bankruptcy of Motorist—Action by Third Party against Insurance Company—Arbitration Clause in Policy making Award a Condition Precedent to Legal Proceedings—Application by Insurance Company to stay Action—Third Parties (Rights against Insurers) Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 25), *s.* 1, *sub-s.* 1—*Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 36, *sub-s.* 4.

The plaintiff was injured in a motor accident and recovered judgment against C. and H. for 300*l.* damages for negligence. H. subsequently became bankrupt. At the time of the accident H. was insured with the defendant company against third party risks. The policy of insurance contained the usual arbitration clause making an award a condition precedent to bringing an action on the policy. The plaintiff issued a writ against the defendant company, contending that under s. 1 of the Third Parties (Rights against Insurers) Act, 1930, and s. 36, sub-s. 4, of the Road Traffic Act, 1930, they were accountable to him for the amount of the judgment. The defendant company thereupon took out a summons to stay the action on the ground that under the arbitration clause the obtaining of an award was a condition precedent to bringing the action. Swift J. dismissed the summons and directed that the summons should be put into the New Procedure List.

On appeal by the defendant company:—

Held, that the rights of the defendant company under the policy were not affected by either of the Acts of 1930, and that the defendant company was therefore entitled to rely on the arbitration clause, which made it a condition precedent to bringing an action that an award should first be obtained.

Woodall v. *Pearl Assurance Co.* [1919] 1 K. B. 593 and *Golding* v. *London and Edinburgh Insurance Co.* (1932) 43 Ll. L. Rep. 487 followed.

Jureidini v. *National British and Irish Millers Insurance Co.* [1915] A. C. 499 distinguished.

Decision of Swift J. reversed.

APPEAL from a decision of Swift J. in chambers.

The following statement of facts is taken substantially from the judgment of Lord Hanworth M.R. :—

The plaintiff, Henry Freshwater, commenced the present action by a writ issued on September 28, 1932, against the defendants, the Western Australian Assurance Company, Ld.

He alleged that on July 24, 1931, whilst travelling on the pillion seat of a motor-cycle of Reginald Thomas Cundy he was injured in consequence of a collision between Cundy's motor-cycle and the motor-cycle of one Leslie Harper; that the collision was due to the negligence of both Cundy and Harper by reason of their not having proper control of their respective motor-cycles; and that in an action which was brought and tried before Talbot J. and a common jury on July 18 and 19, 1932, he (the plaintiff) obtained a verdict for 300*l.* damages against both the defendants Harper and Cundy, with costs. He further alleged that on the day of the accident Harper was insured by the defendant company against third party risks under a policy dated November 1, 1930; that the defendant company defended the said action, which was brought by the plaintiff against Cundy and Harper; and, in spite of that defence, the plaintiff succeeded against both of them; and that although Harper was insured by the defendant company, the defendant company refused to pay the sum for which there was an insurance policy held by Harper against the defendant company as insurers.

The plaintiff further stated that on September 13, 1932, Harper was adjudicated bankrupt and had no assets, and therefore, by virtue of s. 1 of the Third Parties (Rights against Insurers) Act, 1930, the defendant company were now liable to pay to him, the plaintiff, the sum of 300*l.*, with his taxed costs in the action which resulted in the said judgment.

Upon that action being started in that form, the defendant company took out a summons asking that all further proceedings in this action should be stayed, on the ground that the insurance policy held by Harper contained a clause providing for arbitration, and that an award obtained under it should be a condition precedent to any action against them.

The application was made under s. 4 of the Arbitration Act, 1889, which provides: When any party to a submission commences legal proceedings in a Court, that party against whom the proceedings are brought may apply to the Court to stay the proceedings on the ground that in the submission there is a clause providing for arbitration, and thereupon the Court or judge, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, may make an order staying the proceedings.

The defendant company contended that there was no sufficient reason why the arbitration clause in the policy held by Harper should not be implemented; that it was a clause which appeared in a great number of insurance policies; that it was part of a contract they made with Harper, and that no sufficient reason had been established why the case should not be referred to arbitration.

Swift J. did not take that view, but, holding that the case was one of public importance and that there appeared to be legal difficulties to be solved, he exercised his discretion in favour of allowing the action to proceed, and directed that it should be put into the New Procedure List.

The defendant company appealed. The appeal was heard on November 22, 1932.

van den Berg K.C. and *G. J. Paull* for the appellant company. The Third Parties (Rights against Insurers) Act, 1930, does not alter the contract between the insured and the insurance company. There is therefore no reason why the present action should not be stayed and proceedings taken under the arbitration clause of the policy. The question is one for the discretion of the Court.

Under the arbitration clause in the present case the obtaining an award by the plaintiff is a condition precedent to his bringing an action on the policy. *Golding* v. *London and Edinburgh Insurance Co.* (1) is an identically similar case to the present, except that in that case no question arose on the Third Parties Act of 1930. The case of the defendant company is stronger than that case, because here they wrote a letter repudiating the contract.

[LORD HANWORTH M.R. referred to *Russell* v. *Russell.* (2)]

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(1) 43 Ll. L. Rep. 487.

(2) (1880) 14 Ch. D. 471.

There is, it is submitted, nothing in s. 1, sub-s. 1, of Third Parties Act of 1930 or in s. 36 of the Road Traffic Act, 1930, which alters the rights of the parties or affects the provisions of the arbitration clause in the policy.

Croom-Johnson K.C. and *Martin O'Connor* for the respondent. The present case raises a question of great importance—namely, whether a third person injured by an accident caused by a person who is insured against third party risks and who subsequently becomes bankrupt, is bound by the conditions of the policy issued to the bankrupt. It is submitted in the present case that the respondent is not bound either by the arbitration clause in the policy or by any clause not set out in the "insurance certificate" issued under the Road Traffic Act, 1930. Under the Third Parties (Right against Insurers) Act of 1930, s. 1, sub-s. 1, the respondent was subrogated to the rights of the insured against the insurance company, and was therefore entitled to have the compensation payable in respect of the accident paid to him.

Even if that Act does not apply to the present case, the respondent is entitled to have the contract with the insurance company carried out under s. 36, sub-s. 4, of the Road Traffic Act, 1930, which provides that "notwithstanding anything in any enactment, a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons."

Further, by sub-s. 5 of same section, "A policy shall be of no effect for the purposes of this Part of this Act unless and until there is delivered by the insurer to the person [insured] a certificate (in this Part of this Act referred to as a 'certificate of insurance') in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed . . . . in relation to different cases or circumstances." The insurance company cannot therefore rely on any condition which is not stated in the insurance certificate. One must therefore look at the certificate to see what are the conditions as regards third parties. No such certificate was produced. It is therefore submitted that the respondent is not bound by the arbitration clause in the policy.

It is quite clear if this case goes to arbitration it will come back again to the Court on a case stated by the arbitrator.

The fact that difficult questions of law are likely to arise is a ground on which the Court may, where there is a submission, in the exercise of its discretion under s. 4 of the Arbitration Act, 1889, refuse to stay proceedings: *Bristol Corporation* v. *John Aird & Co.* (1); *Workman* v. *Belfast Harbour Commissioners* (2); *Bonnin* v. *Neame* (3); *Walmsley* v. *White.* (4)

The discretion, like all other discretions, must be exercised judicially.

In *Anglo-Newfoundland Development Co.* v. *The King* (5) it was held in the case of a contract which contained an agreement to submit differences to arbitration that, as the matters in dispute included an important constitutional question, the proceedings by petition ought not to be stayed.

van den Berg K.C. replied.

LORD HANWORTH M.R. This appeal raises an interesting point, and one which, as the cases show, has presented some difficulty to the Courts in the past. [His Lordship stated the facts substantially as above set out, and continued:] It will be observed that under s. 4 of the Arbitration Act, 1889, it is not a simple matter of discretion to be exercised by the learned judge. If it were this Court would be very reluctant to interfere with the exercise by the learned judge of his discretion; but, in order to exercise his discretion, the learned judge must first of all be satisfied that there is sufficient reason why the matter should not be referred in accordance with the submission; in other words, the terms of s. 4 mean this: that the Court must hold the parties to that contract, unless some sufficient reason, adequate in the

(1) [1913] A. C. 241.

(2) [1899] 2 I. R. 234.

(3) [1910] 1 Ch. 732.

(4) (1892) 67 L. T. 433; 40 W. R. 675.

(5) [1920] 2 K. B. 214.

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circumstances, justifies the Court in setting aside the term of the contract, and exercising then a discretion in favour of allowing the action to proceed.

The plaintiff takes up a definite and strong position. He says, first of all, that he does not really care what the terms of the policy were as between Harper and the defendants; that by virtue of recent legislation every person is bound to insure against third party risks, and that the third party (so says the plaintiff) has a right, if and when the party who has caused the injury, the insured party, goes bankrupt, to have the compensation payable in respect of the accident paid to him, the third party. He says that for this reason, first of all, that an Act, called the Third Parties (Rights against Insurers) Act, 1930, was passed to obviate the difficulty which arose where a person who was insured went bankrupt and the sum which he was to receive under the policy passed into his general estate, and could not be paid out to the person who had been injured, although no doubt he was the person who had suffered from the accident, and it was owing to the accident that any sum at all was paid under the policy.

So it is that we find in this Act—the Third Parties (Rights against Insurers) Act, 1930—that it is provided by s. 1, sub-s. 1, that "where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then—(*a*) in the event of the insured becoming bankrupt . . . . if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred." The terms of that section are plain enough that where there is under a contract of insurance a person who is insured, then his rights of insurance against the insurer shall pass on to the person to whom the liability was so incurred; but that leaves open the question whether, under the terms of the policy, the insured person still remained insured, and whether he had any, and what, rights against the insurer; so that that does not carry the plaintiff any distance if in this case the insurers desire to raise the point that, by virtue of a misstatement in the answers to questions which were made the basis of the contract of insurance between the insured and the insurers, mistakes have been made such as to invalidate the policy of insurance.

But the plaintiff does not stop there. He says: "Even if that Act does not apply I am entitled to say that I have nothing to do with the detailed terms of the policy of insurance. Harper was insured, and was insured by the Western Australian Assurance Company, and I am entitled, as I have already said, to implement that policy of insurance"; and he says that is so by virtue of s. 36, sub-s. 4, of the Road Traffic Act, 1930, which provides: "Notwithstanding anything in any enactment, a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons."

It is argued on behalf of the plaintiff that the meaning of those words "the policy purports to cover" is: Here is a policy for a certain sum payable to a third party, and inasmuch as we have an insurer and an insured and a sum insured which the policy purports to cover, the plaintiff, by a short cut, can say against the insurers: "Pay me what you have insured under the policy." But I cannot read those words "purports to cover" as meaning simply: Look at the name of the insurers and the insured and the amount insured; disregard all the conditions that are contained in the policy, and the effect of the policy is an out-and-out right to payment, if there is an accident, of the sum insured.

Sub-s. 5 is this: "A policy shall be of no effect for the purposes of this Part of this Act unless and until there is delivered by the insurer to the person by whom the policy is effected a certificate (in this Part of this Act referred to as

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a 'certificate of insurance') in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed . . . ."

We have looked at a certificate of insurance, which merely signifies that there is an insurance for a certain amount of some person to travel in a motor-car; but we have not had our attention drawn to the prescribed form or the particulars which may have been prescribed, and unless that section is carried into effect by prescribing some particulars which may or may not be rendered valid by the certificate, I cannot read sub-s. 5 as making a different policy for the insurance than that which is contained in the actual terms of the policy.

Whether I read, therefore, sub-s. 4 or sub-s. 5, I think the policy of insurance itself must be looked at to see what it purports to cover, and when one looks at this policy and sees what it purports to cover, one sees that it does contain conditions which do, or may, prevent a right to recover on the part of the insured person. In other words, in spite of the terms of the two sub-sections which I have just read of s. 36 of the Road Traffic Act, 1930, one still has to look at the terms of the policy. A third party such as the plaintiff cannot eliminate all the terms and conditions of the policy, but, if he wishes to rely upon the policy, he is bound by the terms and conditions therein written, in other words, he is bound by the clause which provides for arbitration.

I turn, therefore, to consider what are the terms of the policy. The arbitration clause, condition 6, is a very wide one indeed; it is in these terms: "If any difference or dispute of any kind whatsoever shall arise between the insured or any claimant and the company"—that word "claimant" obviously including some one outside the insured; it may be a third party; it may be an executor or an administrator, or the like—"in respect of this policy or in respect of any claim or of any matter or thing or any liability arising or alleged to have arisen hereunder or otherwise connected herewith directly or indirectly the same shall be referred to the final determination and award of a single arbitrator to be agreed upon by both parties. . . . ."

There cannot be—at least, I hesitate to find or to suggest that there are—wider terms of arbitration. Whatever dispute, whatever difference, arises between the insured or a claimant and the company, all such difference and disputes are referred to an arbitrator; and, correspondingly, there is a negative clause: "It shall not be competent to prosecute any action against the company in a Court of law for sums due or alleged to be due under this policy except for the amount of the award and the obtaining of the said award shall be a condition precedent to the liability of the company to make any payment under this policy."

It is to be noted that the words there are "except for the amount of the award"; but that is the only event in which there would be a successful issue to the arbitration in favour of the insured or any claimant. If a liability under the policy is established, and if a loss is established, then the award would be that a certain sum should be recovered from the company who are held to be liable in that amount. If the award was in favour of the company there would not be anything to recover, and so this clause is that no action except for the amount of the award shall be prosecuted.

It seems to me that that clause is a very wide one indeed, and far wider than the clause in *Scott* v. *Avery* (1), but the principle of that case applies to it—namely, that the jurisdiction of the Court is not ousted; the clause is not bad; the condition is lawful; and all that has happened is that no action can be brought until the award has been made. It postpones but does not annihilate the right of access to the Court.

Then comes the proviso: "Provided always that the due observance and fulfilment of the terms provisions conditions and endorsements of this policy in so far as they relate to anything to be done or complied with by the insured and the truth of the statements and answers in the said proposal shall be conditions precedent to any liability of the company to make any payment under this policy."

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(1) (1856) 5 H. L. C. 811.

That proviso means this: that, although the policy stands, yet, when a loss arises or some other occasion requires investigation, it is open to the company to see whether there is any liability to make any payment under the policy, because the right to extract such a payment may have been lost by reason of the inaccuracy of some statements made. It might not be necessary to put an end to the policy wholly, as would be the case where the company have been inveigled by fraud into making a contract of insurance; but this is a contractual stipulation, which gives the right to the company to investigate the question whether or not the conditions which are precedent to the liability have been fulfilled.

Construing that condition 6 and the proviso in the way that I have done, it is plain that this is a case which falls within the decision of the Court of Appeal in *Woodall* v. *Pearl Assurance Co.* (1) and the observations which are made in that case by Bankes L.J. and also within the authority of *Golding* v. *London and Edinburgh Insurance Co.* (2), also a case which was decided in this Court. In both of those cases *Jureidini* v. *National British and Irish Millers Insurance Co.* (3) is distinguished. The *Jureidini* case (3) was different, because in that case what was being considered was not a claim under the policy; there it was held that there had been a complete repudiation of the policy and all its terms.

Mr. Croom-Johnson called our attention to the letter of September 22, 1932, and said that that letter was to the same effect as the one which had been treated in the *Jureidini* case (3) as an absolute repudiation. I cannot so read the letter. It sets out very carefully the terms of the proviso; it sets out the questions and answers to which exception has been taken, and then it says: "These answers or some of them, are untrue, and in the circumstances we have to inform you that our clients, therefore, cannot accept liability under the policy"; because, the proviso standing good as a contractual engagement, they have then become entitled to rely upon the failure to comply with the conditions imposed with regard to the statements and answers made in the proposal. In other words, it appears to me that this Court is bound, not by the *Jureidini* case (1), which is easily distinguished and must be distinguished by the facts in this case and the terms of the policy, but is bound by *Woodall* v. *Pearl Assurance Co.* (2) and also by *Golding* v. *London and Edinburgh Insurance Co.* (3) We have here a case in which the plaintiff is bound by the clause of arbitration.

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(1) [1919] 1 K. B. 593.
(2) 43 Ll. L. Rep. 487.
(3) [1915] A. C. 499.

In those circumstances, has a sufficient cause been shown to us for refusing to give effect to this term of the contract, which is the basis of the liability, that arbitration shall precede any legal proceedings ? It seems to me that no such sufficient case has been made out, and, therefore, the action must be stayed.

There is one other observation which I desire to make. Mr. Croom-Johnson and Mr. Martin O'Connor have both insisted upon the importance of this claim as a claim in which not only the parties but the public may be interested in the result. It may be so, but in sending the case to arbitration the Court does not preclude the possibility of the opinion of the Court on matters of law arising in the arbitration being obtained under s. 19 of the Arbitration Act, 1889.

For those reasons the appeal must be allowed, and an order to stay made. There will be no costs to either side of the action or application to stay, but the appellants are entitled to the costs of the appeal.

ROMER L.J. I agree. The first point taken by Mr. Croom-Johnson is that the arbitration clause in this policy is not binding upon his client. We cannot, of course, stay this action and refer the matter to arbitration if that contention is a good one, and therefore it is necessary to decide the question.

In what I am about to say I do not intend to express any final opinion upon the contention of the insurance company :

(1) [1915] A. C. 499.
(2) [1919] 1 K. B. 593.
(3) 43 Ll. L. Rep. 487.

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that, having regard to the misleading answers, or alleged misleading answers, given by the assured in making the proposal for the policy, their liability under the policy is determined. It may well be that, having regard to the certificate given by the insurance company, it no longer lies in their mouth to say that the policy in respect of which the certificate was given is not a policy which, to use the words of s. 36, sub-s. 1 (*b*), of the Road Traffic Act, 1930, "insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road." It may well be, too, that in any case the insurance company are precluded by the words of sub-s. 4 of s. 36 from raising any such point. That is a question which will ultimately have to be decided in this case, and I agree it is a question of great public importance. But very different considerations apply to the question as to whether the arbitration clause is binding upon the third party. Mr. Croom-Johnson says it does not bind him, for two reasons, as I understand his argument. He says, in the first place, that to hold it is binding upon him would be to run contrary to the provisions of sub-s. 4 of s. 36 of the Road Traffic Act, 1930; but when one looks at the policy it is plain that the liability which the policy purports to impose upon the insurance company is a liability to pay such amount as shall in the first instance be determined by arbitration, and that it is a condition precedent to that company's liability to make any payment that an award shall have been made. To hold that the plaintiff in this matter is bound by the arbitration clause in the policy is not in the least to deprive him of the advantages and privileges given to him by sub-s. 4. It is possible to hold that he is bound by that clause, and yet to give effect in full to every word of that sub-section.

Then it was said by Mr. Croom-Johnson that the clause in question is not binding on his client having regard to the provisions contained in sub-s. 5 of s. 36. Now, that sub-section provides that the certificate shall contain "such particulars of any conditions subject to which the policy is issued"—I am leaving out immaterial words—"as may be prescribed." My attention has not been drawn to any order or rule which does prescribe what particulars are to be included in the certificate, and I have no reason for supposing, as I have not seen it, that the certificate in the present case does not contain all references to such particulars as have been prescribed; but assuming that the certificate is a deficient certificate in that respect, I cannot find any ground in the Act for saying that in consequence of that omission the condition relating to arbitration is not binding upon the third party.

Then, the condition of arbitration, the clause relating to arbitration, being binding upon Mr. Croom-Johnson's client, the next question which arises is as to whether, having regard to the decision in the *Jureidini* case (1), we ought to stay these proceedings. In that case, as I understand it, the defendants were treated as repudiating altogether the contract upon which the plaintiff was suing. As a matter of fact, the plaintiff had not repudiated, so the contract was still in force, and the plaintiff was suing on the contract which in fact contained the arbitration clause; but nevertheless, inasmuch as the defendants were purporting to repudiate the contract, although ineffectually, they were held by Lord Haldane at any rate to be disentitled to rely upon the clause in the contract which provided for arbitration. But the true meaning and extent of that decision have been considered on more than one occasion by the Court, and, as I understand the decisions which have been cited, culminating with the comparatively recent case of *Golding* v. *London and Edinburgh Insurance Co.* (2), the *Jureidini* case (1) does not apply where, as here, the defendant is not saying: "I will have nothing to do with the contract at all," but is merely saying, "according to the true construction of the contract I am under no liability to you whatsoever." So much for the *Jureidini* case. (1)

(1) [1915] A. C. 499.

(2) 43 Ll. L. Rep. 487.

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Then it was said the Court had a discretion in the matter. It is, no doubt, a matter to be taken into serious consideration by the Court that there is that very important question to which I have referred in an earlier part of this judgment; but nevertheless, I think that this action ought to be stayed, and for this reason. If the action goes on and the defendants can satisfy the Court that arbitration was a condition precedent to the action being brought against the insurance company, the condition precedent to their being liable to the plaintiff, the judge, so far as I can see, would have no course open to him but to dismiss the action with costs. If, on the other hand, we now stay these proceedings, the matter will go to arbitration; it will no longer be open to the insurance company to avail themselves of the defence that there has been no performance of the condition precedent relating to the making of an award, and this difficult and important question of law may, and I have no doubt will, as was pointed out by the Master of the Rolls, be raised for the decision of the Court on a case stated.

For these reasons I agree that this appeal should be allowed, with the consequences that have been stated.

Appeal allowed.

Solicitors for appellants: *Shaen, Roscoe, Massey & Co.*
Solicitors for respondent: *J. Nixon Watts & Co.*

W. I. C.

THE KING *v.* ELIZABETH MANLEY.

C. C. A.
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Dec. 12.

Criminal Law—Misdemeanour—Public Mischief—False Story of Robbery by Person of given Description—Time of Police wasted—Persons of same Description exposed to Suspicion.

Conduct causing or tending to cause public mischief constitutes a misdemeanour at common law.

Where a person makes a false statement to the effect that he has been robbed by a man of a given description, thereby leading officers of the police to waste their time and exposing individuals of that description to suspicion, he commits the misdemeanour of causing a public mischief.

Rex v. *Higgins* (1801) 2 East, 5, 21, observation approved and applied.

Rex v. *Brailsford* [1905] 2 K. B. 730 and *Rex* v. *Porter* [1910] 1 K. B. 369 approved.

APPEAL against conviction, a certificate of fitness for appeal having been granted by the Recorder of London.

On November 18, 1932, the appellant, Elizabeth Manley, was charged at the Central Criminal Court on an indictment containing two counts, the first count being that she "on September 10, 1932, did, by means of certain false statements, to wit that on that day a man whose description she then gave had hit her with his fist and taken from her her handbag, six 10*s.* notes, nine 1*l.* notes, 15*s.* in silver, and a receipt, cause officers of the Metropolitan Police maintained at public expense for the public benefit to devote their time and services to the investigation of false allegations, thereby temporarily depriving the public of the services of these public officers, and rendering liege subjects of the King liable to suspicion, accusation and arrest, and in so doing did unlawfully effect a public mischief"; and the second count being that on September 15, 1932, she made a statement that on September 10, 1932, a man whose description she gave came up from behind her and that she then felt a blow in the back and that her bag containing 12*l.* 12*s.* 6*d.* had been taken from under her arm.

The appellant pleaded not guilty.

On behalf of the prosecution evidence was called to support the allegations in the indictment.

On behalf of the appellant these allegations were not denied and no evidence was called, but the submission was made that the indictment disclosed no offence known to the law, and that there was no case to go to the jury.

In giving judgment on that submission the Recorder said: "It is my clear view that this act is one which may tend to a public mischief. It would be intolerable that our police force, already hard pressed to preserve law and order in a time of increasing lawlessness, should have their services deflected in order to follow up charges which are entirely bogus to the knowledge of those making them. In my view, taking the times—you must consider the times in which we live—such an act may distinctly tend to the public mischief. . . . . I hold as a matter of law that this indictment discloses a common law misdemeanour."

The jury found on the evidence that the appellant had done the acts which she was alleged to have done and that she was guilty of the offence with which she was charged.

The Recorder postponed sentence, and granted a certificate that the case was fit for an appeal to the Court of Criminal Appeal on the question whether he was right in holding that the indictment disclosed a common law misdemeanour; and he bound the appellant over to come up for judgment when the Court of Criminal Appeal had decided the question of law.

On November 25, 1932, the appellant gave notice of appeal.

Laurence Vine for the appellant. The appeal should be allowed and the appellant's conviction set aside.

The only offence alleged to have been committed by the appellant was that of having done acts causing or tending to cause a public mischief. It seems to be open to question whether any offence of that description is now known to the law. If, however, such an offence as that does still exist, all the authorities show that the facts necessary to constitute it are very different from those of the present case. In 2 East, P. C. 821 it is stated: "There is also another head of public cheats, indictable at common law, which are levelled against the public justice of the Kingdom. . . . So all frauds affecting the Crown and the public at large are indictable, though arising out of a particular transaction or contract with the party." In *Rex* v. *Brailsford* (1) the acts of persons conspiring to obtain and obtaining by false and fraudulent representations a passport in the name of one person for use by another were held to be acts tending to produce a public mischief, these being acts which might raise trouble of an international kind between this country and a foreign country and thus prejudice this country at large. In the earlier authorities cited in the judgment in that case, such as *Rex* v. *Higgins* (2), the conduct which was regarded as giving rise to this offence was conduct tending to affect the community generally. The fact that the conduct which was in question in *Rex* v. *Brailsford* (1) has since been declared by the Criminal Justice Act, 1925 (15 & 16 Geo. 5, c. 86), to be an indictable offence shows that it affects the country at large. From each of these authorities it appears that conduct in order to cause or tend to cause a public mischief must be conduct causing or tending to cause injury to the public as a whole and not merely certain members of the public. In the present case the facts alleged in the indictment and admitted by the appellant to be true do not amount to conduct on her part causing or tending to cause injury to the public as a whole, but, at most, only to small sections of the public, by engaging for a short time the attention of a few members of the local police force and possibly exposing some individuals to suspicion.

[LORD HEWART C.J. The question is not how many members of the public the defendant's act affects.]

Further, the offences dealt with by the authorities mentioned were all offences involving fraud, whereas the conduct of the appellant in this case involved no fraud, as it could not bring her any profit or advantage.

[AVORY J. referred to *Rex* v. *Vaughan*. (3)]

(1) [1905] 2 K. B. 730. (2) 2 East, 5.
(3) (1769) 4 Burr. 2494.

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The conduct of the appellant no doubt caused annoyance to a certain number of persons, but in so doing it did not amount to a criminal offence. If such conduct as that has not hitherto been criminal, it ought not now to be so regarded. The weight of opinion is not favourable to the declaration by the Court of new offences: see Stephen's History of the Criminal Law (1883), vol. iii., p. 359. The appellant had no mens rea and she ought not therefore to have been prosecuted for any crime. If the conduct of the appellant rendered her liable to any kind of legal process it was only to a civil action on behalf of the ratepayers for compensation for the money spent and work done by the police in investigating the false story of the appellant. Two cases at the last Hertfordshire Assizes, which were similar to the present case, were adjourned by Hawke J. pending the decision of this Court in the present case. There was another case at the last Derbyshire Assizes in which the facts were similar to those of this case, though the indictment was not in the same form, and Humphreys J., in charging the grand jury, expressed the view that no such offence was known to the law, whereupon the grand jury found no true bill.

L. A. Byrne for the prosecution. The decision of the Recorder was right, and the appeal should be dismissed.

First, conduct causing or tending to cause a public mischief constitutes a criminal offence known to the common law. That it does so is plainly shown by the authorities. In *Rex* v. *Higgins* (1) it was laid down by Lawrence J. that "all offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable" (2), and that principle was approved and applied by the Court in *Rex* v. *Brailsford.* (3) In Stephen's Digest of the Criminal Law, Chap. XVI., Art. 178 (6th ed. 1904, p. 123), acts involving public mischief are treated as forming a class of misdemeanours. In order that an act may amount to this offence it need not actually affect more than a section or even a few members only of the

(1) 2 East, 5.

(2) 2 East, 21.

(3) [1905] 2 K. B. 730.

public. In the case of *Rex* v. *De Berenger* (1) Bayley J., referring to the conduct there in question, which tended to injure subjects of the Crown, said: "it is not necessary to constitute this an offence that it should be prejudicial to the public in its aggregate capacity, or to all the King's subjects, but it is enough if it be prejudicial to a class of the subjects." (2) Secondly, if there is such an offence as that of doing acts causing or tending to cause a public mischief, the appellant by doing the acts which she admits having done committed that offence. She caused officers of the police employed by the public for its protection to expend time and labour to no purpose, and she exposed certain members of the public to suspicion and arrest. It is true that these particular acts have not apparently been hitherto held to constitute the offence in question, but they fall within the general description of conduct which has been held to do so, and they ought therefore to be held to do so. In *Millar* v. *Taylor* (3) Willes J. said: "private justice, moral fitness, and public convenience . . . . when applied to a new subject, make common law without a precedent"; and in *Jefferys* v. *Boosey* (4) Pollock C.B. said that he agreed with that passage "so far as it regards the repressing what is a public evil, and preventing what would become a general mischief" though he added that he thought that the common law could not create new rights (5); and Stephen's Digest of the Criminal Law, Art. 160, already referred to, is mainly founded upon these two cases. On the trial of a person charged with an offence of this kind it is for the judge to direct the jury whether the act in question may tend to the public mischief: see per Alverstone C.J. in *Rex* v. *Porter* (6), and it is then for the jury to find whether the act did in fact cause a public mischief. That course was followed here, the Recorder directing the jury that the appellant's conduct might tend to the public mischief, and the jury finding that it in fact had that effect.

(1) (1814) 3 M. & S. 67.
(2) Ibid. 75.
(3) (1769) 4 Burr. 2303, 2312.
(4) (1854) 4 H. L. C. 815.
(5) Ibid. 936.
(6) [1910] 1 K. B. 369, 37 .

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The judgment of the Court (Lord Hewart C.J., Avory and Branson JJ.) was delivered by

Lord Hewart C.J. The appellant in this case was indicted at the Central Criminal Court before the learned Recorder of London for having effected a public mischief. [His Lordship read the counts of the indictment, and continued :] The appellant was convicted, and was bound over to come up for judgment when called upon to do so after this Court had decided the question of law now raised. It was then submitted on her behalf, as it is submitted now, that she had committed no offence; but before that proposition can be assented to it is necessary, as counsel for the prosecution has indicated, to consider two questions.

The first is whether it is true at the present day to say that there is a misdemeanour of committing an act tending to the public mischief. In our opinion that question ought to be answered in the affirmative. We think that the law remains as it was stated to be by Lawrence J. in *Rex* v. *Higgins* (1): "All offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable." (2) That case was referred to with approval in the case of *Rex* v. *Brailsford* (3), and in the still more recent case of *Rex* v. *Porter* (4), where Lord Alverstone C.J., in delivering the judgment of the Court, said: "We are of opinion that it is for the Court to direct the jury as to whether such an act may tend to the public mischief, and that it is not in such a case an issue of fact upon which evidence can be given."

The second question is whether the appellant did acts which constituted a public mischief. As counsel has said, the facts stated in the indictment are not in dispute, and it is admitted that what is there alleged to have been done by the appellant was done by her. In the opinion of the Court the indictment aptly describes two ingredients of public mischief or prejudice to the community, one of these being that officers of the Metropolitan Police were led to devote their time and services to the investigation of an idle charge, and the other being that members of the public, or at any rate those of them who answered a certain description, were put in peril of suspicion and arrest.

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(1) 2 East, 5.
(2) Ibid. 21.
(3) [1905] 2 K. B. 730.
(4) [1910] 1 K. B. 369, 372.

For these reasons the Court is of opinion that the conviction should stand and that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *C. Copley Singleton, Croydon.*
Solicitor for prosecution: *Director of Public Prosecutions.*

J. R.

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THE KING *v.* KINGSTON-UPON-THAMES CONFIRMING AUTHORITY.

Ex parte SCALES.

Licensing—Notice of Application for Full Licence—Application for Off-Licence only—Jurisdiction to grant Off-Licence—Decision as to adequacy of Notice—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *and* 1 *Geo.* 5, *c.* 24), *s.* 15, *sub-s.* 2.

By s. 15, sub-s. 2, of the Licensing (Consolidation) Act, 1910, notice of intention to apply for a new justices' licence "shall set forth . . . . a description of the licence or licences for which [the applicant] intends to apply."

The applicant gave notice under s. 15, sub-s. 1, of the Act of his intention to apply for a full licence, but actually only applied for and was granted an off-licence, which was subsequently confirmed by the respondent confirming authority. The justices were satisfied that no one was misled by the notice:—

Held, that sub-s. 2 must be construed in a practical way, and that as no one had been misled the justices had power to grant and the confirming authority to confirm the off-licence. The justices are the judges of the adequacy of the notice.

Rule Nisi for certiorari.

At an adjourned general meeting the Kingston-upon-Thames licensing justices granted to Henry Herbert Perkins (on behalf of Bentalls, Ld.) a licence to hold an excise licence

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to sell beer, wines, and spirits by retail for consumption off the premises. On May 23, 1932, the respondents, the Kingston-upon-Thames confirming authority, confirmed this licence. The applicant, Edward Scales, another off-licence holder in the borough, then obtained this rule calling upon the respondents to show cause why their order confirming the above off-licence granted to Bentalls, Ld., should not be quashed. The ground of the application was that the respondents had acted in excess of or without jurisdiction in view of the notice of application for a licence which had been given by Bentalls, Ld., under s. 15, sub-s. 1, of the Licensing (Consolidation) Act, 1910 (10 Edw. 7 and 1 Geo. 5, c. 24). By sub-s. 2 of s. 15: "Any notice to be given under this section shall set forth the name and address of the applicant, a description of the licence or licences for which he intends to apply, and a description of the situation of the premises in respect of which the application is to be made."

Bentalls, Ld. (through the said Perkins) gave notice of intention to apply "for the provisional grant to him of a justices' licence authorizing him to hold an excise licence to sell under the Licensing (Consolidation) Act, 1910, any intoxicating liquor which might be sold under a spirit retailer's (or publican's) licence for consumption either on or off the premises situate on the ground floor and the first and second floors of that part of Bentalls' Stores known as the Tudor Restaurant, and also a department on the ground floor adjoining the entrance to the restaurant, and at the time used for the sale of electrical appliances." At the adjourned meeting aforesaid the applicant, Scales, and some 135 other off-licensees were present or represented, but the application, instead of being for the full licence to which the above notice referred, was for the grant of an off-licence only, and this was granted, and, as above stated, confirmed by the respondents. The justices stated that they were satisfied that no one had been misled by the notice.

Norman Birkett K.C. and *Gerald Dodson* showed cause. The justices were entitled to grant the off-licence, although

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the notice was one of intention to apply for a full licence, because it would seem that a full licence includes a licence to sell intoxicating liquor for consumption off as well as on the premises. The greater includes the less. The justices were the persons to decide whether the notice was sufficient, and they decided that it was.

[Avory J. But it may be that some off-licensees, who would not object to the grant of a full licence, would not appear in court to object when they had notice that the application was for a full licence.]

The justices have stated that nobody was misled by the notice; and, in fact, as many as 135 off-licensees were actually present or represented in court. This application has no merits.

Montgomery K.C., *Sidney Lamb* and *Horace Fenton* in support. A licence cannot be granted if not of the character described in the notice: see s. 15, sub-s. 2, of the Act. No doubt a full licence includes all the others, and the applicant must, logically, contend that a notice of intention to apply for a full licence includes notice of application for all the rest. But this cannot be so.

[Lord Hewart C.J. Could not the justices have granted a full licence and attached conditions thereto which would, in effect, have made it what it is now?]

No, because in granting a full licence they must have attached a monopoly value. On seeing this notice many off-licensees who would have opposed the grant of an off-licence would not attend, because, although, no doubt, a full licence includes an off-licence, it is well known that in granting a restaurant licence justices will attach conditions which will prevent an ordinary off-licence business from being carried on under it. Besides other off-licensees many other people object to off-licences, because intoxicating liquor is often sold on premises so licensed under the heading of groceries, etc., and these might have appeared to oppose. It is impossible to say that no one was misled by this notice.

LORD HEWART C.J. This is a rule nisi for a writ of certiorari to the confirming authority for the borough of Kingston-upon-Thames calling upon them to show cause why a writ of certiorari should not issue to remove into this Court the order made by the confirming authority on May 23, 1932, confirming a certain licence granted by the licensing justices for the borough authorizing Mr. Perkins (on behalf of Bentalls, Ld.) to hold an excise licence to sell beer, wines and spirits by retail at premises situate in Wood Street in the said borough for consumption "off the premises, being the enclosed portion situate to the left or north of the entrance to the Tudor Restaurant." Two grounds were named in the rule, but one of them has been abandoned. The effective ground is that the confirming authority acted in excess of jurisdiction or without jurisdiction in confirming the grant of a licence which the justices had no power to grant on the notice of application as given.

No doubt it is provided by s. 15, sub-s. 2, of the Licensing (Consolidation) Act, 1910, that such notice shall set forth a description of the licence or licences for which the applicant intends to apply, and it appears that the original intention was to apply for a licence to sell "on or off the premises situate on the ground floor and the first and second floors of that part of Bentall's Stores known as the Tudor Restaurant, and also a department on the ground floor adjoining the entrance to the restaurant." In fact a change of mind took place, and what was asked for and what was granted was an off-licence. That course was taken in the presence of counsel and others representing an enormous number of off-licensees. Looking at all the facts the chairman of the justices said: "It is not suggested that any one has been misled, and we are satisfied that no one is misled." Subject to the surrender of another beerhouse licence they granted the off-licence asked for. That decision having been given the justices held an adjourned confirming meeting on May 23, when the objectors were again heard, and the confirming authority confirmed the licence.

It seems to me in those circumstances, whatever may be said on a small technical point, that the respondents showing cause are substantially right. No one was misled, and that which was permitted to be done under the licence granted is but a part of that which would have been permitted to be done under the licence originally asked for. The respondents are right in saying that the justices are the judges of the adequacy of the notice. Other considerations no doubt would apply if something more were asked for than was included in the notice. The rule must be discharged.

AVORY J. I am of the same opinion. I think that s. 15, sub-s. 2, of the Act of 1910 must be construed in a practical way and not in the technical sense suggested, and as soon as the justices find that no one is misled it is open to them to deal with the case on its merits. I am confirmed in that opinion by the statement in the affidavit in support of this rule that the opposition included 136 off-licensees. It is clear that no one was taken by surprise.

BRANSON J. I agree and have nothing to add.

Rule discharged.

Solicitors showing cause: *Durham, Charlton, Carn & Shelley.*

Solicitors in support: *C. A. Maddin & Co., Surbiton.*

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MORRISS *v.* BAINES AND COMPANY, LIMITED.

Practice—Payment of Money into Court with Admission of Liability—Verdict for smaller Amount—Money in Court taken out by Plaintiff before Trial—Power of Court to order Return to Defendant—R. S. C., Order xxii., *rr.* 1, 5.

The defendants in an action against them for libel paid 525*l.* into Court under Order xxii., r. 1, with an admission of liability. The plaintiff, acting upon Order xxii., r. 5, took the money out of Court and went on with his action. At the hearing the jury awarded the plaintiff one farthing damages. The plaintiff claimed to retain the money taken out, on the ground that as it had been taken out of Court before trial the Court had no power to order its return:—

Held, that the money in question was now the property of the plaintiff and that the Court had no power to order its return to the defendants.

Held, also, that the plaintiff was entitled to his costs of action up to the date of payment in.

Gray v. *Bartholomew* [1895] 1 Q. B. 209 and *Brown* v. *Feeney* [1906] 1 K. B. 563 distinguished.

Semble, when the defendant has paid money into Court with an admission of liability the plaintiff may take out the money at any time before the conclusion of the trial.

Semble, the Court in such circumstances has no power to allow a defendant to amend his pleadings by denying liability, revoking payment into Court and pleading justification after the plaintiff has taken the money out of Court.

Observations on the effect of R. S. C., Order xxii., r. 1. (1)

Decision in *Fleming* v. *Dollar* (1889) 23 Q. B. D. 388, discussed.

Further consideration of an action tried by McCardie J. with a special jury.

The plaintiff brought this action for damages for libel contained in an article published by the defendants in

(1) R. S. C., Order xxii., provides:—
Rule 1: "Where any action is brought to recover a debt or damages . . . . any defendant may, before or at the time of delivering his defence or at any later time by leave of the Court or a Judge, pay into Court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made; or he may, with a defence denying liability (except in actions or counterclaims for libel or slander), pay money into Court . . . ."

By r. 5: "In the following cases of payment into Court under this Order —namely . . . . (*b*) when the liability of the defendant, in respect of the claim or cause of action in satisfaction of which the payment into Court is made, is not denied in the defence . . . . the money paid into Court shall be paid out to the plaintiff on his request, or to his solicitor on the plaintiff's written authority, unless the Court or a Judge shall otherwise order."

December, 1925 (and in other articles not here material), in the Leeds Mercury, a newspaper of which they were the proprietors, printers and publishers. The defendants in their defence admitted that they published the article, and that it was defamatory, and they paid 525*l.* into Court with an admission of liability. In July, 1932, the plaintiff gave notice that he had taken out this money, but proceeded with his action. The action was heard in December, 1932, when the jury awarded the plaintiff one farthing damages. The plaintiff refused to return the sum of 525*l.* (less one farthing), and the point was then argued upon further consideration whether the Court had power to order the plaintiff to return the money, and what order should be made as to costs.

Charles Doughty K.C. and *R. T. Monier-Williams* for the plaintiff.

Norman Birkett K.C. and *Wilfrid Lewis* for the defendants.

The arguments of counsel appear sufficiently in the judgment below.

Cur. adv. vult.

1933. Jan. 13. McCARDIE J. read the following judgment: The main point in this case is of practical interest to those concerned with actions for defamation. The relevant facts can be stated in a few sentences. In June, 1931, the plaintiff began an action for libel against the defendants, who are the proprietors of a well-known newspaper in the North of England. The statement of claim asked for damages in respect of alleged libels published by the defendants so long ago as October, 1925, December, 1925, and February, 1926. With the first and third libels I am not concerned for the moment. The plaintiff abandoned any claim in respect of them when the case came to be heard before a special jury and myself, on December 12, 1932.

The arguments in this case arose with respect to the second libel—namely, that published by the defendants in

December, 1925. The actual words of the libel are not material. The statement of claim was delivered in July, 1931. On November 30, 1931, the defendants delivered their defence. They admitted publication and that the words were defamatory of the plaintiff, and they also admitted that the words bore the innuendoes alleged by the plaintiff. They paid into Court the sum of 200*l.* with an admission of liability. It is to be noted that under Order XXII., r. 1, a defendant is not allowed, in cases of libel or slander, to pay money into Court with a denial of liability. This provision is subject, however, to certain limited exceptions which are stated with clearness in Mr. Gatley's excellent volume on Libel and Slander, 2nd ed., pp. 570–571. In June, 1932, the defendants got leave to amend, and they paid into Court a further sum of 325*l.*, making a total of 525*l.* in respect of the libel of December, 1925. In July, 1932, the plaintiff gave notice to the defendants that he had taken out of Court the said sum of 525*l.* He still proceeded, however, with the action in the hope, apparently, of obtaining from the jury a larger sum. When, however, the action was heard before me in December last, the jury awarded the plaintiff the sum of one farthing only. In my opinion they were amply warranted in fixing that contemptuous sum as damages. Thereupon counsel for the plaintiff were asked if the plaintiff would return to the defendants 524*l.* 19*s.* 11¾*d.* This the plaintiff refused to do. He meant to keep what he had got unless the Court had power to order the return of the money and in fact exerted that power in favour of the defendants. Hence the point was argued before me as to the power and duty of the Court under the circumstances I have stated.

The question is one of practical importance in view of the many actions for defamation which are brought before the Courts, and in view, also, of the fact that certain persons at the present time carry on a considerable and profitable trade in actions for defamation brought against newspaper proprietors and others. Now it would seem to be the moral duty of the plaintiff to return to the defendants the difference between the farthing and 525*l.* Counsel for the plaintiff did not dispute that moral duty, but relied on the existing state of the law as precluding the Court from making any order for the return of the 524*l.* 19*s.* 11¾*d.* Counsel for the plaintiff were, of course, bound to act on the direct and personal instructions received by them from the plaintiff. The point, therefore, arises definitely as to my power and duty with respect to the money taken out by the plaintiff in July, 1932. The plaintiff was entitled under Order XXII., r. 5, to take out that money. The rule provides (inter alia) that where the liability of the defendant in respect of the claim or cause of action in satisfaction of which the payment into Court is made is not denied in the defence, the money paid into Court shall be paid out to the plaintiff on his request, unless the Court or a judge shall otherwise order. In the present case no order was made by the Court or a judge to prevent the plaintiff from taking out the 525*l.*

The question raised before me may be said to be of extended importance, inasmuch as the money was paid in by the defendants not under any special provision with respect to libel (such as that under Lord Campbell's Act, 1843, 6 & 7 Vict. c. 96), but under the general provisions of Order XXII. How then does the matter stand as a matter of law ? To begin with, it is clear that if the plaintiff, instead of taking out the money before trial, had allowed it to remain in Court until the trial, the judge would have power to direct that the whole of the 525*l.* (except one farthing) should be repaid to the defendants. The facts would then fall within the scope of the words in Order XXII., r. 5: "Unless the Court or a Judge shall otherwise order": *Gray* v. *Bartholomew.* (1) It is important to notice that the ratio and essence of that decision seems to be that the money paid in by the defendants still remained in Court at the trial of the action. It was in the hands of the Court to do with as might be just. In the next place there are several cases which illustrate the authority and, indeed, the duty of the

(1) [1895] 1 Q. B. 209.

Court, under certain circumstances, to make an appropriate order with respect to moneys in Court which may be said to be "derelict" or "sterilized" in its hands. Thus in *Brown* v. *Feeney* (1) the defendant had paid money into Court, with an admission of liability in respect of a libel on the plaintiff. The plaintiff did not take the money out, but proceeded with the action. The defendant then died and so the litigation abated. It was held by the Court of Appeal that they could order the money in Court to be paid out to the plaintiff, and such order was in fact made. It was clearly pointed out by Vaughan Williams L.J. that money paid into Court by a defendant, even though with an admission of liability, does not ipso facto become the property of the plaintiff. As the learned Lord Justice put it: "He [the plaintiff] merely gets the right under the rule to take it out of Court, subject to the power of the Court to order otherwise, and he gets nothing more." It seems obvious that the underlying ratio of the decision in *Brown* v. *Feeney* (1) was that the Court had power to deal with money which was actually in the hands of the Court. Indeed, Vaughan Williams L.J., after citing *Gray* v. *Bartholomew* (2), says: "That decision is inconsistent with the money having become the property of the plaintiff (i.e., from the mere fact that it has been paid into Court without denial of liability) because it is inconceivable that any Court should make an order taking away the money from the plaintiff after it has become his property." Those words can, I think, only be interpreted as meaning that when once the money has been taken out of Court by the plaintiff it does in fact become his property—but not till then. In *Maxwell* v. *Viscount Wolseley* (3) the Court of Appeal applied the principle of *Brown* v. *Feeney* (1) to a case where it was the plaintiff in a libel case who died before taking out the money which the defendant had paid into Court with an admission of liability. The Court awarded the money to the plaintiff's executors. The decision of the Court of Appeal in *Beaumont* v. *Beaumont* (4) is of interest only as illustrating the distinction between the powers of the Court when a sum is actually in Court as compared with cases where no sum is actually in Court.

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(1) [1906] 1 K. B. 563, 567.
(2) [1895] 1 Q. B. 209.
(3) [1907] 1 K. B. 274.
(4) [1933] P. 39; 49 Times L. R. 35.

In the action now before me, the plaintiff in fact took out of Court long before the trial the sum paid in by the defendants with an admission of liability. What was the result of that step taken by the plaintiff ? It seems to me on the existing decisions that the money must be deemed to have thereupon become the property of the plaintiff. Thus in *Critchell* v. *London and South Western Ry. Co.* (1) Fletcher Moulton L.J. said : "The rules (of Court) make it plain that where a defendant admits his liability and pays money into Court simply to meet the plaintiff's claim for damages, the plaintiff has a right to take the money out and use it, unless in a particular case the Court thinks otherwise." A similar view had been expressed by Jessel M.R. in the Court of Appeal in *Emden* v. *Carte* (2), a case which dealt with the Rules of Court which existed prior to the Rules of 1883. Jessel M.R. said (when referring to the judgment of Thesiger L.J. in *Berdan* v. *Greenwood* (3)) : "It is quite intelligible that a man may say : 'I am under no liability to you, but I am willing to pay you a sum of money if you abandon your claim,' and that mode of pleading enables a defendant so to say. But when he says it the legal consequences, as gathered from that judgment, are exactly the same as if it had been a pure admission of liability—the plaintiff has a right to take the money out of Court, and to keep it, whether it is paid as a simple admission of liability (in which case, of course, he would be entitled to keep it) or paid in in the nature of a payment of, as it is sometimes called, 'blackmail,' to get rid of the trouble or the expense of the action. In either case it is paid in, and there is an end of it, and the plaintiff has the right to take it out of Court and to keep it as his own."

I may venture here to say that in substance I expressed in *Chiverton* v. *Ede* (4) views similar to those expressed in the

(1) (1907) 1 K. B. 860, 864.
(2) (1881) 19 Ch. D. 311, 317.
(3) (1878) 3 Ex. D. 251.
(4) [1921] 2 K. B. 30, 46.

Court of Appeal in *Berdan* v. *Greenwood* (1) and *Critchell* v. *London and South Western Ry. Co.* (2), just cited, although neither of those particular cases was cited to me and they were not in my recollection when giving judgment. I recalled, however, their general effect. It is desirable also to add that in my own day at the Bar the point which has here arisen was incidentally before the Court of Appeal more than once. There is no report of the views there expressed. I am, however, clear in my memory that the Court of Appeal took the view that the principle of *Gray* v. *Bartholomew* (3) only applied when the plaintiff, instead of taking out the money paid in with an admission of liability, had left it in Court until the trial of the action. It is to be noted that in the third edition of Odgers on Libel (published in 1896) at p. 573 appears the following passage: "To a general plea of payment into Court some pleaders reply generally that the sum paid in is insufficient; but a mere joinder of issue will raise that point with equal effect. In either case," proceeds the text-book, "a prudent plaintiff will at once take the money out of Court under Order XXII., r. 5, lest after verdict the judge may order some of it to be paid out to the defendant." He then cites *Gray* v. *Bartholomew*. (3) That passage represents the view taken by the Courts when I practised at the Bar and was engaged as counsel in a very large number of actions for defamation.

Having regard to the decisions I have mentioned, I do not feel able to direct that the plaintiff shall return to the defendants any part of the 525*l.* he took out of Court. I regret that my powers are not wider in such a case as the present. It is proper to state that the defendants have made no application to me to amend their defence with respect to the amount paid in by them. To apply after the verdict would indeed be to apply at a late stage of the proceedings. The record before me stands with an admission of liability by the defendants to the extent of 525*l.* I must here point out what seems to be a curious result of the decisions I have cited. The effect apparently is to destroy, in substance, the power of the Court to allow a defendant to amend when once a plaintiff has taken the money out of Court. I need give one illustration only. It not infrequently happens that a defendant has felt bound to admit liability and pay into Court, because, at the time of delivering his defence, he has not got sufficiently strong proof of the matters needed for a plea of justification. Assume that soon after the defence has been delivered the defendant obtains the necessary proof. He desires to amend by striking out his admission of liability, revoking his payment into Court, and by pleading justification. But let me assume also that the astute plaintiff has already taken the money out of Court. What then is the effective power of the Court to grant an amendment for the purpose of needed justice ? Apparently the normal power to grant amendment is futile in such a case if the Court cannot direct the plaintiff to pay back the money into Court. Many other illustrations will readily occur to the practitioner. It appears to me that the point I have just stated has not yet received any adequate consideration in the existing decisions. The matter is a serious one, inasmuch as the problem and the injustice are not in the least confined to actions for defamation. The point is the same in all actions where a defendant has admitted liability and paid into Court. It seems to me that the only answer by those who support the existing situation will be to quote the maxim : "Interest reipublicae ut sit finis litium." I need not now analyse or criticize that impressive but ambiguous phrase. I may here also point out that apparently a plaintiff, where defendant has paid in with an admission of liability, may take out the money at any time—not only on the morning of the day of trial, but even when the trial is actually taking place and he sees that the case is going against him : see the observations of Vaughan Williams L.J. in *Hubback* v. *British North Borneo Co.* (1) An equally important point in connection with actions for defamation, and peculiar to them, arises from

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(1) 3 Ex. D. 251.

(2) [1907] 1 K. B. 860.

(3) [1895] 1 Q. B. 209.

(1) [1904] 2 K. B. 473, 477.

Order XXII., r. 1, which precludes a defendant in actions for libel and slander from delivering a defence which denies liability, and at the same time paying a sum of money into Court in satisfaction. Before the Supreme Court Rules of 1883 there was no objection to such a course. Cases of defamation stood on the same footing as all other cases. The general principle was stated by Thesiger L.J. in *Berdan* v. *Greenwood* (1) in the Court of Appeal. That was not an action of libel. He said: "Is there, then, anything inherently unjust in a defendant paying money into court in respect of a cause of action, which at the same time he by his pleadings denies to exist? As a general proposition we should answer nothing, whilst there is much to be said in favour of it." In *Hawkesley* v. *Bradshaw* (2) (which was a case of libel) a powerful Court of Appeal (Bramwell, Baggallay, and Thesiger L.JJ.) held that there was no objection to a defendant in a libel case setting up a plea of justification and also making a payment into Court in satisfaction. The judgments will well repay perusal at the present day; for instance, Bramwell L.J. said: "Now take the case of an action for libel; the defendant says he did not publish the libel, but rather than contest an action he pays *5l.* into Court, why should he not do so? Take another case where the defendant says it is no libel, but rather than contest that question I will pay *5l.* into Court. Then take another case, where the defendant says the libel is true, why should he not in that case be allowed to pay *5l.* into Court rather than contest it?" But in the year 1883, Order XXII., r. 1, was altered so as to preclude a defendant in cases of libel and slander from taking the double defence of a denial of liability and also a payment into Court. A reason for the change appears to be indicated by Coleridge C.J. in *Fleming* v. *Dollar* (3), where he begins his observations with the words: "But morally and practically there is a difference between libel and other cases." I need not set out the whole passage.

(1) 3 Ex. D. 251, 257. (2) (1880) 5 Q. B. D. 302, 303.
(3) 23 Q. B. D. 388, 391.

Now I knew many years ago from private sources the reasons which, it was thought, called for an alteration of Order XXII., r. 1, into its present form with respect to libel and slander. The main reason may be presented by the illustration afforded by a case where a plaintiff, who alleged he was defamed, desired only to vindicate his character in open Court and did not intend to ask the jury for any substantial damages. In such a case, it was said, hardship might result to the plaintiff at the trial if a defendant was allowed to deny liability and at the same time pay a sum into Court in satisfaction. The case I have given is, I may say, somewhat rare, but in any event I do not see much force in the illustration if a judge at the trial had been given an adequate discretion as to costs. But whatever might be the force of the single illustration I have given, regard must be had to the numerous illustrations which can be mentioned by any experienced practitioner to show the hardships on defendants in defamation cases by reason of the existing rule. Take the case, for example, where the defendant contends (*a*) that the words are not defamatory at all, and (*b*) that in any event they do not refer to the plaintiff. Why should not the defendant in such a case be at liberty to deny liability—and at the same time pay a proper sum into Court ? In many actions of libel and slander the alleged defamation is in any event somewhat trivial. I can speak from a long and wide experience (both at the Bar and on the Bench) in cases of defamation, and I venture to express the view that the present rule does more harm than good. Too often it prevents exposure, in cases where exposure should be made in the public interest. No real hardship, I think, can result to honest plaintiffs from an alteration of the present rule, provided (*a*) that the judge at the trial has a full and complete discretion as to the costs and (*b*) that a plaintiff who desires to take money out of Court and end the action should have liberty to apply to a judge in Chambers for an order that for special reasons the case be mentioned in open Court. The judge could then ascertain whether the plaintiff genuinely desired to clear his character or whether he was a mere trader in actions of defamation. Upon the mention of a case in Court the judge could ensure that the true nature of the action should be disclosed.

It is perhaps permissible for me to doubt the practical expediency of the decision in *Fleming* v. *Dollar* (1) and of several of the observations made therein. That decision, I know, has been approved and applied in later cases. I venture, with diffidence, to suggest that perhaps too narrow a view has been taken in various judgments dealing with the law of defamation, that too little regard has been paid to changed conditions, and that too little attention has been directed to several considerations of public policy which might properly be urged by those who are defendants in cases of libel and slander. I recognize the power of the Press to injure reputations and I agree that the law must be strong to enable a good character to be vindicated and to penalize baseless imputations. But I know quite well how large a number of fraudulent or undesirable persons remain unexposed through the severity of the rules of law with respect to defendants in cases of defamation. The public too often loses the protection it so greatly needs. I know also of the large trade that exists in seeking to extort damages from newspaper proprietors and others in a manner which is little better than disguised blackmail.

In the present case judgment must be entered for the defendants. The defendants must have the costs of the action as from the date (November 30, 1931) when they made their first payment into Court—namely, of the sum of 200*l.*, and they must also have the extra costs (if any) incurred by them in connection with the first and third alleged libels which were abandoned by the plaintiff at the trial. In view of the authorities referred to by me in *Martin* v. *Benson* (2), and not forgetting the new wording of Order LXV., r. 1, I do not feel justified in the circumstances before me in depriving the plaintiff of his costs of action up to November 30.

(1) 23 Q. B. D. 388.

(2) [1927] 1 K. B. 771.

1931, when the defendants made their first payment into Court. The balance of costs in favour of the defendants will be adjusted by the Taxing Master.

Judgment for defendants.

Solicitors for plaintiff: *Blount, Petre & Co.*

Solicitors for defendants: *Patersons, Snow & Co., for Dibb, Lupton & Co., Leeds.*

F. P. F.

CUNARD AND WIFE *v.* ANTIFYRE, LIMITED.

1932
Dec. 2, 5, 6, 20.

Negligence—Nuisance—Landlord and Tenant—Liability of Landlord for Injury to Occupier of Premises in same Building—Defective Guttering—Duty to Repair.

The defendants were the lessees and occupiers of a building which they were liable to keep in repair by the terms of their lease. The plaintiff, Mr. Cunard, occupied a flat on the third floor of the building with his wife, who was his co-plaintiff. This floor he held on a monthly tenancy from one M. who in turn held the second, third and fourth floors from the defendants upon a lease which contained a covenant by M. to keep the demised premises in repair "drains and roof and damage by fire excepted." The effect of the various leases, as the Court held, was that the main roof and guttering were vested in the defendants as occupiers. The plaintiffs' flat included a kitchen with a glass roof which projected beyond the back wall of the fourth floor immediately above. In December, 1931, owing to the defendants' neglect to repair, a heavy piece of guttering fell from the main roof of the building through the glass roof of the plaintiffs' kitchen, causing broken glass to strike Mrs. Cunard and injure her. The plaintiffs claimed damages:—

Held, that the defendants as occupiers were under a duty to take reasonable care that the guttering should not fall, and that the plaintiffs as occupiers of a flat in the same building should have been in their reasonable contemplation as persons closely and directly affected by neglect of that duty, and that the plaintiffs were entitled to succeed. It is immaterial that the tenements are part of the same structure.

Causes of action in negligence and nuisance distinguished.

Appeal from Westminster County Court.

The following statement of fact is taken from the judgment of the Court, delivered by Talbot J.:—

"In this case, which is an appeal from the Westminster County Court, the male plaintiff occupied rooms on the third floor of a large building in Orange Street, Haymarket, and lived there with his wife, who is the other plaintiff. He occupied under a monthly tenancy granted by word of mouth by one Mallinson, who was lessee of the rooms comprising the second, third and fourth floors of the building from the defendant company under a lease dated July 19, 1927, for twenty-one years, less three days, from Christmas, 1926. This lease contained a covenant not to underlet or part with the possession of any part of the demised premises without the previous licence in writing of the lessors. No such licence had been obtained for the sub-letting by Mallinson to the male plaintiff. On this ground it was contended by the defendants in the county court that the plaintiffs were mere trespassers. This appears to us to be quite untenable, and it was abandoned before us. By the lease, Mallinson covenanted during the term to keep the demised premises in good and substantial repair and condition internally and externally, drains and roof and damage by fire excepted. The lessors covenanted to perform (so far as the lessee was not liable for such performance under his covenants) all the covenants of the lessee, that is, the defendant company, contained in the head lease. By the head lease, made on November 20, 1926, between the Carlton Hotel, Ld., as lessors, and the defendant company as lessees, of the freehold premises, 14 Orange Street, for twenty-one years from Christmas, 1926, the defendant company covenanted during the term to keep the whole of the demised premises in good and substantial repair and condition internally and externally, damage by fire excepted. By an agreement made June 22, 1927, between the parties to the head lease, the lessors, the Carlton Hotel, Ld., permitted the lessees, the defendant company, to convert the second, third and fourth floors of the premises into residential chambers, and to sub-let those floors to Mallinson. The rooms on the third floor, occupied by the plaintiffs at the time when the events which are the subject of this action happened, included a kitchen covered by a glass roof projecting beyond the back wall of the fourth floor, which was next above the third, and immediately under the main roof of the building. It was alleged by the plaintiffs, and denied by the defendants, that the effect of the relevant instruments was that the main roof and the guttering connected with it remained vested in the defendants as occupiers for the term of the lease, and was not included in the sub-lease to Mallinson. The plaintiffs relied principally on the language of the parcels in the lease from the defendants to Mallinson, 'all those rooms comprising the whole of the second, third and fourth floors of the premises,' the defendants being themselves clearly lessees of the whole building. In our opinion the plaintiffs are right as to this, and we are confirmed by *Cockburn* v. *Smith*. (1)

On December 4, 1931, Mrs. Cunard was in the kitchen before mentioned when a heavy piece of the guttering from the main roof of the building fell through the glass roof of the kitchen, causing part of the broken glass to strike and cut her and damage her clothes. It is for this that she claims damages against the defendant company. Her husband joins in the action claiming 8*l.* 3*s.* for damage to chattels in the kitchen, doctor's fees, and the expenses of cleaning his wife's clothes incurred by him, and damage for loss of the use of the kitchen while the defendants were repairing the roof of it. The defendants also put up new guttering at the top of the building. The trial took place in the Westminster County Court on March 16, 1932. There was evidence that the guttering which fell on the kitchen had never been properly supported, that the want of proper support was obvious to any one who looked at it, that it had leaked for some time owing to decay of the screws by which it had been attached to a wooden fascia behind it, and that it could not have been expected to last without repair more than about ten years from the time that it was put up. At the close of the plaintiffs' case, the question of the amount of damages having been postponed, counsel for the defendants submitted that the plaintiffs had proved no case. After argument the judge gave judgment as follows: 'On the oral and documentary evidence given in

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(1) [1924] 2 K. B. 119, 128, 134.

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support of the plaintiffs' case, I hold there was no duty owing by the defendants to either of the plaintiffs who are making the claim against the defendants to take steps to prevent the guttering becoming a nuisance or to take reasonable care to see that it was reasonably safe. I give this decision with some diffidence and some reluctance,' and then his Honour made certain orders as to costs and granted a stay of execution. According to the judge's note, the argument for the defendants before him was chiefly directed to the point (on which we have already stated our opinion) that for want of any licence by the defendants to Mallinson to sub-let, the plaintiffs were trespassers and complete strangers, and that therefore the only duty of the defendants to them was not to harm them wilfully. The defendants called no evidence, and obviously when the judge had given judgment as above they were under no necessity to do so. There appears to have been little or no cross-examination on any material point."

From this judgment of the county court judge the plaintiffs appealed to the Divisional Court.

A. de W. Mulligan for the plaintiffs. The county court judge was wrong. The defendants, as adjoining owners and occupiers, owed a duty to the plaintiffs to take reasonable care that the guttering was safe. The plaintiffs' tenancy was valid, although leave was not obtained by Mallinson to the letting, for the defendants have never intervened to put an end to it. An adjoining owner who is also occupier is bound to keep his premises in such a state of repair that his neighbour will not be injured by falling bricks or guttering: *Chauntler* v. *Robinson* (1); *Todd* v. *Flight*. (2) In *Todd* v. *Flight* (2) the landlord was held liable although he was not occupier. That case was decided upon demurrer. Scrutton L.J. pointed out in *St. Anne's Well Brewery Co.* v. *Roberts* (3) that the landlord in *Todd* v. *Flight* (2) was not in fact occupier. In such a case the plaintiff must show that the nuisance existed when the landlord let the premises and that he knew it. But so far as the present case is concerned *Todd* v. *Flight* (1) is still a binding authority, for here the defendants are both adjoining owners and occupiers, and must be taken to have known of the defective condition of the guttering. The plaintiffs here have proved that the defendants have an estate in the premises, that they are occupiers, that the male plaintiff was tenant of the third floor flat when the accident happened, and that he is also the occupier. As to Mrs. Cunard, the state of the guttering amounted to a nuisance, and she being one of the family is entitled to recover. When an injunction is granted for a nuisance caused by an adjoining owner, the injunction extends to protect the plaintiff " or his family ": *Broder* v. *Saillard.* (2) In *Malone* v. *Laskey* (3) the plaintiff, a married woman, was held to have no cause of action against adjoining owners for nuisance caused by vibration. But there the husband was not a tenant and had no estate whatever in the premises. That case is therefore distinguishable. Here the husband is the tenant, and the husband and wife must be considered as one for the purpose of torts committed against her. The liability of an adjoining owner may well extend to all persons lawfully on the premises, but in any case it is the defendants' duty to keep their premises in such repair as not to cause a nuisance to the plaintiffs, both husband and wife.

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(1) (1849) 4 Ex. 163.

(2) (1860) 9 C. B. (N. S.) 377.

(3) (1928) 140 L. T. 1; 44 Times L. R. 703.

Geoffrey Howard for the defendants. The act complained of here is not in the nature of a public nuisance as on a highway. It is a private nuisance only, and for such the plaintiffs are not entitled to recover: Salmond on Torts, 7th ed., § 58. In *Nunn* v. *Parkes* (4) the Court held that no action for private nuisance lies, except for injury to some land or easement in which the plaintiff has a legal interest. The guttering is not in the nature of a dangerous thing, as in *Rylands* v. *Fletcher* (5), and the doctrine in that case cannot apply. Apart from that the defendants owe no duty

(1) (1860) 9 C. B. (N. S.) 377.

(2) (1876) 2 Ch. D. 692, 703.

(3) [1907] 2 K. B. 141.

(4) Unreported. See note in Law Journal newspaper (1924), Vol. 59, p. 806.

(5) (1868) L. R. 3 H. L. 330.

to the plaintiffs. There is at most non-feasance on their part, not mis-feasance. In *Cockburn* v. *Smith* (1) a landlord was held liable for failing to remedy defects in the roof of a building which were a source of danger to his tenant. There he had notice of the defects, but there is no such evidence in the present case, nor was the defect one the existence of which the defendants ought to have known. The male plaintiff here has suffered only the amount of the special damage, and his wife is not entitled to recover, because she has no right of occupation or interest in the premises in the proper sense of the term. She cannot recover on the ground of negligence, because she has no contractual relation with the defendants: *Malone* v. *Laskey*. (2) The judgment of the county court judge here was strictly a non-suit, and the defendants did not call evidence on the question of liability.

As regards the effect of the lease to Mallinson, Mallinson was not liable to repair the roof, but the roof was not thereby excluded from the lease to him. The defendants are not therefore in occupation of it.

Cur. adv. vult.

The Divisional Court (ACTON and TALBOT JJ.) allowed the appeal.

Dec. 20. TALBOT J. [who delivered the judgment of the Court, read the above statement of facts and findings, and continued:] The question of substance in the case is whether in the circumstances the occupier of the guttering was under a duty to either or both of the plaintiffs to take reasonable care that it did not get into such a state that it was likely to fall on the roof of the kitchen and do damage. Neither of the plaintiffs is in any contractual relation to the defendants, and any right of action therefore which they may have must be in tort. We think that some confusion has been caused by the use by the plaintiffs both in their particulars of claim and in their notice of appeal of the word "nuisance." We think that "nuisance" (we are speaking

(1) [1924] 2 K. B. 119.

(2) [1907] 2 K. B. 141.

of private nuisance only) is correctly confined to injuries to property, whether to easements such as the obstruction of light or of rights of way, or the diversion of water courses, or the withdrawal of support from a house; or to other kinds of property, as by noise, noxious vapours, smoke or the like: see Bullen and Leake, Precedents of Pleadings, 3rd ed., p. 377. In all such cases the plaintiff in order to maintain an action must show some title to the thing to which the nuisance is alleged to be (Comyns' Digest: Action upon the case for a nuisance E. 1), and this follows from the nature of such actions. Private nuisances, at least in the vast majority of cases, are interferences for a substantial length of time by owners or occupiers of property with the use or enjoyment of neighbouring property; and it would manifestly be inconvenient and unreasonable if the right to complain of such interference extended beyond the occupier, or (in case of injury to the reversion) the owner, of such neighbouring property: see per Moulton L.J., *Malone* v. *Laskey*. (1) We think, therefore, that the use of the word "nuisance" to describe what is complained of in this case is incorrect, and that the plaintiffs' true cause of action (if they have one) is for negligence, for failure by an occupier of property to take reasonable care that his property does not get into such a state as to be dangerous to adjoining property or persons lawfully thereon. The male plaintiff was, as we hold, the occupier of the kitchen on which this guttering fell; and his wife was there as his wife and by his permission, though in our opinion for the purposes of this case it is immaterial in what capacity she was there, so long as she was there lawfully. If the right or the duty alleged by the plaintiffs exists, they are the right of, and the duty to, any one lawfully in the kitchen, and of and to the occupier of it, and the owner of the chattels in it. By way of analogy, though the case is in no sense an authority for the present, we may refer to the judgment of Lord Atkinson in *Cooke* v. *Midland Great Western Ry. of Ireland*. (2) The question there was as to the liability of an occupier of land who kept a dangerous thing

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(1) [1907] 2 K. B. 141, 153.

(2) [1909] A. C. 229, 234, 238.

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on it for injury resulting to a child. After quoting authorities, Lord Atkinson says: "I omit the words 'public place or thoroughfare' from the immediately preceding sentence, because I think the principle of these decisions applies to any place to which boys or children have a legal right to go and may reasonably be expected to be not unlikely to frequent. The origin of the legal right to be in the particular place in which the boy or child comes in contact with the vehicle or machine, or the mode in which that legal right has been acquired, is, in my view, irrelevant": see also per Lord Macnaghten. (1) Nor in our opinion does it make any difference that the kitchen was a part of the same building of which the defendants occupied the main roof. The mutual rights and duties material to this case would be exactly the same if part of an adjacent building had been in the same position as was this kitchen relatively to the guttering which fell; a position, that is, in which it was certain that the guttering, if it did fall, would fall on it.

As we have said, we think that the use of the word "nuisance" is incorrect, but it can make no difference to the decision of the appeal. It is our duty to see whether the facts, so far as they have been ascertained, give the plaintiffs or either of them a cause of action, whatever may be its appropriate description. It may, perhaps, be worth while to add that under the old system of pleading actions for nuisance and for negligence were alike forms of action on the case. No doubt a nuisance may be caused by negligence, and there may be cases in which the same act or omission would support an action of either kind, but, generally speaking, these two classes of actions on the case are distinct, and the evidence necessary to support them is different. The law as to actionable negligence, depending on breach of duty owed by defendant to plaintiff, has always been stated in broad terms, and it is of its essence that it is applicable to an infinite variety of facts. We venture to adopt the language of Lord Macmillan in *Donoghue* v. *Stevenson* (2): "The law takes no cognizance

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(1) [1909] A. C. 229, 234, 238.

(2) [1932] A. C. 562, 580-83, 618-19.

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of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. What, then, are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty. Where there is room for diversity of view, it is in determining what circumstances will establish such a relationship between the parties as to give rise, on the one side, to a duty to take care, and on the other side to a right to have care taken." What, then, is the law of actionable negligence, a law which it is important to remember is to be found only in the statement of it by judges? (See per Lord Atkin in the same case.) The same learned Lord states the law in the same case as follows: "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. This appears to me to be the doctrine of *Heaven* v. *Pender* (1), as laid down by Lord Esher (then Brett M.R.) when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith L.J. in *Le Lievre* v. *Gould.* (2) Lord Esher says: 'That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property.' So A. L. Smith L.J.: 'The decision of *Heaven* v. *Pender* (1) was founded upon the principle, that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other.'" Apply this to the present case. It seems clear that the persons having the control of this guttering, if they had directed themselves to the omission, of which they have been accused, to take reasonable care that it should not fall, must have had the occupier of the kitchen, and any person lawfully in the kitchen, on which if it did fall it must fall, "reasonably in contemplation," as "closely and directly affected" by the omission. There are, of course, many other definitions of negligence in the books. We will quote one or two which have been commonly received. "The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do": Alderson B. in *Blyth* v. *Birmingham Waterworks Co.* (3) "The definition of negligence is the absence of care, according to the circumstances": Willes J. in *Vaughan* v. *Taff Vale Ry. Co.* (4) These utterances of great judges illustrate what we have said as to the breadth and elasticity of the conception of actionable negligence in our law. Perhaps they might fairly be combined as "the absence of the care which a prudent and reasonable man would take in the circumstances." It would be difficult to call a man prudent or reasonable who, being possessed of a heavy piece of metal suspended over the glass roof of a dwelling-house, would not consider it to be his duty to take care that the support was sufficient to prevent it from falling. We have referred to statements as to what negligence is generally. Let us now consider the application of the law to cases resembling the present. There is no doubt that if this guttering and the roof on which it fell had been parts of adjoining but distinct buildings, and if by negligent omission to keep the guttering and its support in proper repair it had fallen on the roof, the owner or occupier or both would have had an action for damage to the building: *Todd* v. *Flight* (1); *St. Anne's Brewery Co.* v. *Roberts*. (2) In *Todd* v. *Flight* (1) the only matter in debate was whether in the circumstances the action lay against owner or occupier. It can make no difference that the two tenements here are parts of the same structure, any more than it could make a difference whether two adjoining houses were detached or separated only by a party wall. Again, on what principle can the owner or occupier of the adjoining tenement have an action of tort (contract being out of the case) for the injury to his house caused by the wrongful non-repair of his neighbour's house (see the end of the judgment in *Todd* v. *Flight* (1)), whereas he or another person in the same house has no remedy for personal injury done by the same means at the same time? It is because injury may be expected to result if the thing becomes out of repair that there is a duty to take care to keep it in repair, and it is plain that the injury which may be expected may be either to the house itself or to the person of any one who may happen to be using it, or both. It seems to follow that the duty to take care to avoid doing injury is owed to all who are likely to suffer injury if the duty is neglected, whatever form the injury takes. Apply another test. If the defendants had (as they ought to have done, and now have done) replaced the dangerous guttering by new

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(1) (1883) 11 Q. B. D. 503, 509.

(2) [1893] 1 Q. B. 491, 497, 504.

(3) (1856) 11 Ex. 781, 784.

(4) (1860) 5 H. & N. 679, 688.

(1) 9 C. B. (N. S.) 377.

(2) 140 L. T. 1.

guttering properly supported, and in the course of the work their workman had negligently dropped part of the old guttering on the roof of the kitchen with the same results as ensued on the fall of the guttering in the present case, could it be doubted that both plaintiffs would have had a cause of action in which the damages would have been the same as in this case? We understood counsel for the defendants to admit that they would. Again, there is no doubt that if this guttering had overhung the street in the condition proved in the case before us, and had fallen on someone passing below and injured him, that person would have had an action against the defendants on the principle of *Tarry* v. *Ashton.* (1) What is that principle? It is in our opinion that any one in occupation and control of something hung over a place, in which people may be expected lawfully to be, is bound to take reasonable care that it does not fall and injure them. This seems to us to be both law and justice; and, as we have already said, it is in our opinion immaterial whether in such a case the plaintiff is in the place where he is injured as one of the King's subjects entitled to use the highway, or in the exercise of any other legal right. A closely similar principle applies to work done or chattels kept or moved in the like dangerous situations: see such cases as *Byrne* v. *Boadle* (2); and it makes no difference whether the plaintiff was in the highway, as in that case, or in any other place where he had a right to be, and where people might be expected to be: *Scott* v. *London and St. Katherine Docks Co.* (3) Compare the judgment of the Court in *Degg* v. *Midland Ry. Co.* (4) delivered by Bramwell B. Counsel for the defendants strongly pressed upon us (what is certainly remarkable) that there appears to be no reported case precisely in point, and it was chiefly for that reason that we took time to consider our judgment. Consideration has confirmed us in the belief that the judgment below cannot be reconciled with established principles of law:

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(1) (1876) 1 Q. B. D. 314.

(2) (1863) 2 H. & C. 722; 33 L. J. (Ex.) 13.

(3) (1865) 3 H. & C. 596; 34 L. J. (Ex.) 220.

(4) (1857) 1 H. & N. 773, 779; 26 L. J. (Ex.) 171.

and if that is so, it would obviously be wrong not to apply those principles merely because it cannot be shown that they have been applied before to facts exactly like these. This, of course, needs no authority, but we may notice an instance in which the same principles which govern the case before us were applied admittedly to a case of first impression. In *Vaughan* v. *Menlove* (1) damages were recovered against the defendant for negligently allowing a stack on his land to heat and take fire, thereby burning some buildings of his own, from which the fire spread to the plaintiff's cottages. Tindal C.J. said: "I agree that this is a case primae impressionis, but I feel no difficulty in applying to it the principles of law as laid down in other cases of a similar kind." The defendants relied on *Malone* v. *Laskey* (2) as a definite authority in their favour. The facts in that case were somewhat peculiar. The defendants as trustees for a building society owned the freehold of a house which they had let to a tenant. The tenant sub-let to a company. The plaintiff was the wife of the company's manager, and lived with her husband and their family in the house. The defendants were under no liability to repair the house. The defendants also owned, and apparently occupied, premises adjoining the house, and put up in those premises an engine in connection with electric light. There having been complaints by the plaintiff and her husband to their employers' immediate landlord of vibration caused by the engine, and also that the tank of a lavatory in the house was unsafe, and these complaints having been communicated to the defendants, the defendants sent plumbers, their servants, to make the tank safe. The plumbers put up a bracket to support it, but a few months after they had done so it fell and injured the plaintiff. The jury found that the vibration from the engine was a nuisance, that it caused the fall of the bracket, that the plumbers' work was negligent, and left the lavatory in a state dangerous to any one using it. Judgment having been entered accordingly for the plaintiff, the Court of Appeal entered judgment for

(1) (1837) 3 Bing. (N. C.) 468, 474. (2) [1907] 2 K. B. 141.

the defendants. The grounds of the decision were: (1.) that the plaintiff not having any legal interest in the house could not maintain an action for nuisance by vibration; (2.) that there was no contractual relation between the plaintiff and the defendants; no possession or occupation of the house by the defendants; no obligation on the defendants to do any work there; no invitation or licence by the defendants to the plaintiff to be in the house; no knowledge by the defendants that the lavatory was dangerous after the work was done there; and therefore no duty on the defendants to the plaintiff such as to support her action against them for negligence. Kennedy L.J., in concurring, expressed considerable doubt as to the second ground. We have stated the facts and the effect of the judgment somewhat fully in order to make it clear that it is no authority in the present case. Here the thing, the defective condition of which caused the injuries complained of, was in the occupation and control of the defendants; they were solely responsible for taking care that it should not become dangerous; and they had full means of knowing, even if they did not actually know, that it was dangerous before it fell. We were also referred to a case of *Nunn* v. *Parkes*. (1) It was a case of nuisance by stopping up ditches on the defendants' land, and thereby causing water to escape which damaged chattels of the plaintiff on premises in which he had no estate or interest. So far as appears, there was no question of negligence. This Court gave judgment for the defendant, holding (in accordance with *Malone* v. *Laskey* (2) and other cases) that no action for private nuisance lies except for injury to some land or easement in which the plaintiff has a legal interest. In our opinion neither of these cases creates any difficulty in deciding, as we do, for the reasons we have indicated, in favour of the plaintiffs. We are of opinion that the judgment of the county court must be set aside.

The question remains whether judgment should be entered for the plaintiffs for damages to be assessed, or whether a

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(1) Unreported. See note in Law Journal newspaper (1924), Vol. 59, p. 806.

(2) [1907] 2 K. B. 141.

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CUNARD AND WIFE v. ANTIFYRE, LD.

new trial should be ordered, the case going back to the county court for that purpose with our opinion on the law. We are not quite sure what is the attitude of the parties as to this. As we understand, when at the close of the plaintiffs' evidence it was submitted that there was no case, the judge said: "The case must proceed." We should take that to mean that the defendants had then to make their whole case by evidence or argument, or both. They were, of course, entitled to call no evidence, relying on the contention that even on the plaintiffs' evidence they were entitled to judgment, but we do not see how it can be said that the judge in any way relieved them of the duty of producing their evidence then and there if they wished to contradict the plaintiffs' evidence on matters of fact. Subject, therefore, to any further argument, it appears to us, holding as we do that the judge's decision is erroneous in law on the evidence then before him, to be the proper course to remit the case to the county court for assessment of damages only, directing that judgment be entered for the plaintiffs for the amount found due. In other words, the only question remaining for decision will be the amount of damages, unless, of course, the parties can agree them.

Appeal allowed.

Solicitors for plaintiffs: *Castle & Co.*
Solicitors for defendants: *Windsor & Brown.*

F. P. F.

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Nov. 21, 22, 23, 24, 25; *Dec.* 16.

RUDD *v.* ELDER DEMPSTER AND COMPANY, LIMITED.

[1931. R. 1358.]

Master and Servant—Accident to Servant—Breach of statutory Duty—Negligence of Fellow Servant—Common Employment—Absence of "personal negligence or wilful act of employer or of some person for whose act or default the employer is responsible"—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 29.

Sect. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, provides that: "When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid":—

Held, that this sub-section operates to relieve an employer from liability at common law to a workman who has been injured in the course of his employment where the accident has been caused by a breach of statutory duty without personal negligence or wilful act of the employer or of any one, such as a director or general manager, for whose act the employer would be liable as if it were his own.

Groves v. *Wimborne* [1898] 2 Q. B. 402 explained.

Appeal from a decision of Humphreys J. in an action tried with a special jury at Liverpool.

The plaintiff, who was a dock labourer in the employment of the defendants, the owners of the vessel *Macgregor Laird*, was engaged at the material time in connection with the loading of that vessel in the Harrington Dock, Liverpool. He was in the lower hold of the vessel, and certain iron girders were being transferred from a lighter alongside, to be loaded in the lower hold, when the rope by which they were being lowered broke, and the girder fell and struck the plaintiff, causing him such serious injuries that he eventually became insane.

It appeared that in connection with the loading of the vessel a good new 4-inch manilla rope was issued for the work on Monday and was used for loading light goods from Monday to Wednesday inclusive. On Thursday it was used in the loading of the iron girders. At midday one of the workmen, Corran by name, who had seen the rope in the morning in good condition, said to Ainsworth, the "holder-on" at the port drum of the winch regulating the rope, "Just keep your eye on that fall, Jack, and see how it goes. If you see anything bad, sing out in good time." Ainsworth in his evidence said that at 1 o'clock the fall was all right, but that at about 2 o'clock he noticed scorching and oil coming out of the rope, but no fraying. He called down the hatch to stand from under, as "this fall is not getting too good." The hatch foreman, Hawkins, looked at the rope, examined the interior, and pronounced it all right, saying, "All right, Jack, there is only a couple more [slings of iron] left." The rope was then used and a sling of the girders started down the hatch, apparently before the men there were ready for it; it had in consequence to be held stationary for three or four minutes, and the winch being kept running set up intense friction and heat so as to damage the rope, which in consequence broke, and the girders fell, one of them striking the plaintiff and injuring him as already stated.

The various men engaged in the operation were all experienced and had been many years in the defendants' service.

The plaintiff alleged that the rope which broke was not of suitable quality and/or free from patent defects, and by using it the defendants committed a breach of Regulation 20 (*a*) of the Dock Regulations, 1925, which provides that "no rope shall be used in hoisting or lowering unless (1.) it is of suitable quality and free from patent defects." He further relied on Regulation 30 of the same Regulations, which provides that "no machinery, chains or other lifting appliance shall be loaded beyond the safe working load. . . ." Further, he alleged that the system by which the girders could be left suspended for three or four minutes, while the winch was kept running, thereby setting up intense friction and heat so as to damage the rope, which in consequence broke, was defective.

The defendants denied that there was any negligence or breach of statutory duty on their part, and they said that if the plaintiff's injuries were due to any negligence or breach of statutory duty, that negligence or breach of statutory duty was that of the plaintiff's fellow servants in common employment with him. Further, they contended that the action was not maintainable by reason of s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925. (1)

The jury, in answer to questions left to them, said: (1.) that it was part of the system of loading sanctioned by the defendants that the winch might continue to run while the load was being suspended, as it was in this case; (2.) that the rope used was not of suitable quality; (3.) that the rope was not free from patent defect, and that such defect contributed to its breaking; (4.) that the rope was loaded beyond its safe working load, and that this contributed to its breaking. The jury assessed the damages at 3000*l.*, for which amount judgment was entered for the plaintiff.

The defendants appealed.

Lynskey K.C. and *Sellers* for the appellants. There was no evidence to justify any of the findings of the jury, and in those circumstances no liability was established against the appellants. Even, however, if, contrary to our contention, it can be said that there was any evidence of a breach of statutory duty, the appellants are exempted from liability in this action by virtue of the provisions of s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, which reproduces in substance similar provisions in the Workmen's Compensation Acts, 1897 and 1906. The language used is explicit that an employer "shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act," that is, "the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible." No such personal negligence or wilful act was established against either the employers or any one in a directorial or managerial position whose negligence or wilful act could in law be treated as that of the employers themselves. The effect of the sub-section is to exempt the employers from civil liability at common law, not only in respect of negligence on the part of a person in common employment with the injured man, but likewise in respect of a breach of statutory duty in the absence of personal negligence on the part of the employers or their alter ego. Here the appellants did not know that a defective rope was used, if it can be said that one was in fact used; there was therefore no "personal negligence" on their part, nor did any "wilful act" of theirs conduce to the accident. What is a "wilful" act was considered by Bowen L.J. in *In re Young & Harston's Contract* (1), where he said that it amounts to no more than this, that the person of whose action or default the expression is used "knows what he is doing, and intends to do what he is doing, and is a free agent." The appellants, as they were entitled to do, delegated the duty of carrying out the work of loading the vessel to competent workmen; they did not warrant that the plant was safe, but only undertook to use reasonable care to see that it was safe: *Fanton* v. *Denville* (2); and that duty they carried out. No doubt reliance will be placed for the respondent on the decision in *Groves* v. *Wimborne* (3) as establishing that the defence of common employment is not applicable in a case where injury has been caused to a servant by the breach of an absolute duty imposed by statute upon his master for his protection. But it has to be observed that the section in the Workmen's Compensation Act, 1897, corresponding to s. 29, sub-s. 1, of the Act of 1925 was not called to the attention of the Court.

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(1) This section is set out in the headnote.

[SCRUTTON L.J. *Groves* v. *Wimborne* (3) was decided on June 28, 1898, and the Workmen's Compensation Act, 1897, did not come into operation till July 1, 1898. The section

(1) (1885) 31 Ch. D. 168, 174, 175. (2) [1932] 2 K. B. 309.
(3) [1898] 2 Q. B. 402.

of that Act could not therefore be taken into consideration in *Groves* v. *Wimborne.* (1)]

That case, in those circumstances, has no bearing upon the question now being considered. Unless s. 29, sub-s. 1, of the Act of 1925 is read in the way in which we contend that it should be, the first three lines and the last three are mere surplusage; and, further, if the sub-section is not intended to exempt the employers from civil liability at common law for a breach of statutory duty, there was no need for s. 32 of the Act, which provides that: "Nothing in this Act shall affect any proceeding for a fine under the enactments relating to mines, factories or workshops, or the application of any such fine." Under s. 136 of the Factory and Workshop Act, 1901, the whole or any part of a fine imposed for a breach of the provisions of the Act, in consequence of which a workman is injured, may be applied for the benefit of the injured workman. The point now contended for—namely, that s. 29, sub-s. 1, has the effect of exempting an employer from liability at common law for a breach of statutory duty—was discussed in *Higgins* v. *Harrison* (2), and the view was there expressed, obiter, that an action based on breach of statutory duty where there has been no personal negligence or wilful act of the employer is barred by s. 29, sub-s. 1.

Goldie K.C. and *Maxwell Fyfe* for the respondent. There was ample evidence to justify the finding of the jury that the system of working whereby a load was suspended for three or four minutes, thereby entailing undue friction on the rope, was defective, and also the findings that the rope used was not of suitable quality, that it had a patent defect, and that it was loaded beyond its safe working load. The Dock Regulations impose an absolute duty on the appellants in respect of the rope used in loading, and they cannot escape liability for a breach of that duty. A breach of the Factory Act regulations has always been treated as personal negligence or wilful act on the part of the employer, apart altogether from the dictum of Vaughan Williams L.J. in

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(1) [1898] 2 Q. B. 402.

(2) (1932) 25 B. W. C. C. 113.

Groves v. *Wimborne* (1); and where there is a breach of the statutory duty the doctrine of common employment has no application. The breach of the statutory duty is negligence: Halsbury's Laws of England, vol. xx., p. 130; *Couch* v. *Steel* (2); *Holmes* v. *Clarke.* (3) In *Kelly* v. *Glebe Sugar Refining Co.* (4) it was said that "the neglect of the statutory provisions creates a prima facie case of fault against the factory owners which will render them liable in damages to their employees who may have been injured through that fault." *Groves* v. *Wimborne* (5) says in effect that where there is a breach of statutory duty, the person suing need not trouble to establish negligence; the duty is so absolute that the employer cannot escape liability by saying that he was not personally negligent. In *David* v. *Britannic Merthyr Coal Co.* (6) the fact that such a statutory duty is absolute was again affirmed, Moulton L.J. saying that breaches of the statutory provisions become statutorily equivalent to negligence; see to the same effect *Butler* v. *Fife Coal Co.* (7); *Watkins* v. *Naval Colliery Co. (1897), Ld.* (8); *Thomas* v. *Bolton & Sons* (9); and *Calder* v. *Nimmo & Co.* (10) In *Beckley* v. *Scott & Co.* (11) Holmes L.J., who was then considering the section of the Workmen's Compensation Act, 1897, corresponding to s. 29, sub-s. 1, of the Act of 1925, said that it was not "the intention of the Legislature that the new provisions should supersede rights of action that had theretofore existed; and this is made clear by the declaration that 'when the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer.'" Ever since 1898 it has been assumed that this section and the corresponding sections of the earlier Acts do not bar an employee from bringing an action at common law. That practice ought not to be disturbed.

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(1) [1898] 2 Q. B. 402, 418.
(2) (1854) 3 E. & B. 402.
(3) (1861) 6 H. & N. 349.
(4) (1893) 20 R. 833, 835.
(5) [1898] 2 Q. B. 402.
(6) [1909] 2 K. B. 146, 164; affirmed on one point [1910] A. C. 74.
(7) [1912] A. C. 149, 160, 161.
(8) [1912] A. C. 693.
(9) (1928) 44 Times L. R. 640.
(10) 1906 45 Sc. L. R. 212, 214, 215.
(11) [1902] 2 I. R. 504, 533.

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[*Senior* v. *Ward* (1) was also referred to.]

Lynskey K.C. in reply. The Legislature in enacting s. 29, sub-s. 1, of the Act of 1925 obviously intended to limit in some way a workman's right against his employer, and the words used, especially those at the end of the sub-section, are apt to describe the liability of an employer at common law. *Groves* v. *Wimborne* (2) made it quite clear that a breach of statutory duty and negligence are two different things. A. L. Smith L.J. said (3): "In the present case, which is an action founded upon the statute, there is no resort to negligence on the part of a fellow-servant or of any one else." See to the same effect per Fletcher Moulton L.J. in *David* v. *Britannic Merthyr Coal Co.* (4) The distinction is also brought out in *Watkins* v. *Naval Colliery Co.* (1897) *Ld.* (5)

[GREER L.J. My difficulty is that that case and probably others should have been decided the other way if your contention is right.]

The section now relied upon was not called to the attention of the House. If the argument for the respondent that a breach of statutory duty becomes statutorily equivalent to negligence, the use of the word "personal" was quite unnecessary. "Personal negligence" means what it says—namely, negligence of the employer personally.

[*Cribb* v. *Kynoch, Ld.* (*No.* 2) (6), and *Bennett* v. *L. & W. Whitehead, Ld.* (7), were also referred to.]

Cur. adv. vult.

Dec. 16. The following judgments were read:—

SCRUTTON L.J. This appeal by Elder Dempster & Co., well known Liverpool shipowners, against a judgment for 3000*l.* based on the verdict of a Liverpool special jury in favour of one of their workmen, a member of a stevedore's gang engaged in loading one of their ships, raises difficult questions of law and fact.

(1) (1859) 1 E. & E. 385.
(2) [1898] 2 Q. B. 402.
(3) Ibid. 410.
(4) [1909] 2 K. B. 146, 158.
(5) [1912] A. C. 693.
(6) [1908] 2 K. B. 551.
(7) [1926] 2 K. B. 380.

There is no dispute about some facts. Loading was going on into a hold in which three decks were concerned, called in this case (1.) the main deck, on which there stood a winch; (2.) below it the shelter deck; (3.) below it the 'tween deck. Rudd, the plaintiff, was working in the square of the hatch on the 'tween deck stowing gunny bags. There is no plea of contributory negligence. A flat, or barge, on the starboard side of the ship contained iron girders and angle irons. These were being lifted out of the flat in a sling by a manilla rope passing through a pulley on a derrick and thence to the starboard drum of the winch. Lifted in this way the girders were deposited on the ship's main deck when the hoisting fall, or rope, was released from the sling. A lowering fall was then fastened to the sling; this fall passed through a pulley on a second derrick and was attached to the port drum of the winch, which then lifted the sling over the hatch and lowered it, if not stopped, to the 'tween decks. It would, of course, be quite usual to carry out this operation by one fall which would lift the sling from the flat till it could swing over the hold, and be lowered direct. But the use of two falls and two drums of the winch has been the practice for many years and enables the work to be done quicker. It, however, increases the friction between the drum and the rope. The two drums are mounted on one barrel, consequently when the starboard drum is hoisting from the flat, the port drum is also hoisting or coiling up any rope attached to it, and if it is desired that the port rope should either lower the load or hold it stationary, that rope must be slacked off. On the other hand, if the starboard rope is being lowered, either by reversing the winch or slacking off the rope, the port rope must also go through the same operation, and if it is desired to hold the load stationary, the rope must be slacked off against the drum, and very considerable friction will be caused. It is common ground that it is proper to use manilla rope, and also that with this system of two falls, the normal life of a good rope may be a week only, and may, if great strain is put on the rope, be only half a day. The intense friction and heat destroys the rope and it breaks.

It may happen that what is going on in the hold requires a stoppage of the lowering, which may put a great strain on the rope if the winch is working, and if continued long enough, would inevitably destroy the rope.

Elder Dempster & Co. do their own stevedoring, and have in their service a very experienced set of men with long service and practice in loading. Of these Ainsworth, with twenty-one years' service, was " holder-on " at the port drum of the winch regulating the port rope. Hawkins, with thirty years' service, was hatch foreman of No. 4 hold giving orders for lowering and lifting. John Corran, with forty-eight years' service, was one of the senior quay foremen in general control. A good new 4-inch manilla rope was issued for the work on Monday and used for loading light goods for two days between Monday and Wednesday inclusive. On the Thursday it was used for loading iron. Corran at midday, having seen the rope in the morning in good condition, said to Ainsworth: " Just keep your eye on that fall, Jack, and see how it goes. If you see anything bad, sing out in good time." Ainsworth, who was called by the plaintiff, said that at 1 P.M. the fall was all right, but that somewhere about 2 P.M. he noticed scorching and oil coming out of the rope, but no fraying. He called down the hatch: "Now men, this fall is not getting too good, stand from under." The hatch foreman, Hawkins, came and looked at the rope and examined the interior by reversing the twist of the rope. He pronounced it all right and said: "All right, Jack, there is only a couple more [slings of iron] left." It is not clear now what happened ; it was not carefully examined at the trial. There were only two loads to come up from the barge. Some time, not stated, after Hawkins' examination, a load of iron was delayed in going down the hold. If it was the second of the two loads left over, there was no need to work the starboard drum, for there were no more loads to lift. If it was the first, it is not clear whether the starboard drum was then lifting the second load from the barge. Consequently it is not clear whether the two drums were doing work at the time of the accident. A short time after Hawkins intervened, a sling of iron was started down the hatch apparently before the men below were ready for it, as they had not finished stowing the previous sling. The second sling had therefore to be held stationary by the holder-up, and to ease its weight one end of it was rested on the shelter deck, the other end slinging on the rope. For how long this happened, and what work was being done by means of the starboard drum, and for how long, is left very vague by the evidence. Ainsworth having said once that the sling was held stationary for three or four minutes, when asked again said: "(Q.) And it was left hanging there for three or four minutes? (A.) Perhaps so, yes. (Q.) Was the winch working all that time? (A.) Occasionally." It is difficult to suppose that more than one hoist from the flat took place during that time, but while the starboard rope was being lowered into the flat the port rope would have to be hauled in, or its slacking checked, to keep the port sling stationary, and this would cause great friction between the drum and the port rope. Anyhow, the port rope broke after the load had been stationary for some time; the port sling fell into the hold and a girder struck the plaintiff. It was not thought at first that any serious damage had been done, but unfortunately some time afterwards signs of brain injury appeared. It was not disputed that they were due to the accident. The plaintiff is now hopelessly insane. Damages would be difficult to assess in such a case, but the jury assessed them at 3000*l.*, and there is no complaint of their assessment.

It is difficult to avoid the finding that either the hatchman in giving a premature order to lower, or Ainsworth in not stopping the winch when the sling had to be held stationary for some time, or both, was or were guilty of negligence. No question was asked of the jury on this point. The plaintiff's counsel were probably afraid of the doctrine of common employment, and defendants' counsel did not wish to attack their own servants. Plaintiff's counsel ran the case (1.) on personal negligence of the employers in using an unsuitable system; (2.) on breaches of statutory regulations by the employer.

The question about "system" is taken from the language of Lord Watson in *Smith* v. *Baker & Sons.* (1) But, as pointed out in the judgment of this Court in *Fanton* v. *Denville* (2), in *Smith* v. *Baker & Sons* (1) the House of Lords held that it was not competent to raise in that House any questions about the negligence of the employer, as no such point had been taken in the Court below. This had two results: (1.) that any observations by the noble Lords on the subject of the employer's duty or negligence were obiter; (2.) and, of more importance, in consequence the number of cases referred to in *Fanton* v. *Denville* (2) showing that the master did not absolutely warrant the safety of plant or system, but fulfilled his duty by using reasonable care to appoint competent foremen and overseers, and if he fulfilled that duty, was not liable for the negligence of such foremen or overseers to their fellow workmen, were not cited to the House. This, as will be seen, has considerable bearing on the question of personal negligence or wilful act of the employer. A corporation cannot be negligent in itself, but, as an employer, is liable to its workmen for the negligence only of its governing body, directors, or general manager. This kind of point is also discussed in *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.* (3) on the liability of the shipowner for "damage happening without his actual fault or privity": see per Lord Haldane. (4) The company is liable for the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable, because his action is the very action of the company itself.

On this question of system, the jury were asked: "Was it part of the system of loading sanctioned by the defendants that the winch should continue to run while the load was being held suspended as in this case?" There is some obscurity as to their answer. The judge's note and counsel's note says "Yes." The shorthand note says: "Yes, it was

(1) [1891] A. C. 325, 354.
(2) [1932] 2 K. B. 309.
(3) [1915] A. C. 705.
(4) Ibid. 713, 714.

part of the system of loading that the winch should continue to run." The written answers of the jury have unfortunately not been preserved by the Associate as should have been the case. It is not clear whether the question related to "this case" as "suspension for three or four minutes," or to any suspension, however long, say half an hour, or to a reasonable suspension having regard to the probability of friction. But it is still odder that though the judge directed the jury that "the defendants ought to devise a system of working, or method of working, which will not expose their employees to unnecessary danger, reasonably safe as a system can be" no question was asked of the jury whether the system which they found to be sanctioned by the employer was dangerous or reasonably safe. This may be because the plaintiff's experts, instead of condemning the system, had approved it. Mr. Panton had said at p. 30 of the shorthand notes: "(Q.) Am I right in saying that the system adopted in this ship you have heard described is the system that was in force thirty years ago? (A.) Oh yes. (Q.) And so far as your knowledge goes, it has been in force by every steamship company in Liverpool ever since? (A.) More or less. (Q.) I may take it that you as an expert, Mr. Panton, do not complain of our system? (A.) I do not." Again at p. 37, cross-examined by Mr. Lynskey, he was asked: "(Q.) Did you not tell me that the system we adopt has been adopted for thirty years all along the line of docks in Liverpool? (A.) More or less. (Q.) A system which has been found safe and effective in working? (A.) Yes." Mr. Ryder had said: "(Q.) You gave a long statement: are you suggesting that our working system is defective? (A.) No. . . . . (A.) It is the cause of trouble arising in a system of working adopted for years throughout the Liverpool Docks." No wonder plaintiff's counsel said: "I suggested that the system adopted was not a desirable one, but I did not get the answers I wanted, my Lord."

I did not find it easy to ascertain what was the system complained of, or what exactly the complaint of it as a system was. It was admitted that for over twenty years every

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shipowner in Liverpool had, without serious accident, used a two-drum winch, relying on the discretion of the experienced men they employed to do the hoisting or lowering so as not to cause undue friction between the drum and the ropes. Of course, any man, however experienced or careful, may by an error of judgment or an act of negligence cause an accident, in this case by excessive friction on the rope continued for too long a time. But this is true of any system of loading; an experienced man may negligently sling a load so that it falls, or work a winch too fast, or lower a load without warning the men in the hatch. But it is not the system that is bad. The system leaves the working to the discretion of an experienced man. What goes wrong is not the system, but the temporary failure to use discretion correctly. I questioned plaintiff's leading counsel and read my note of his answers to him to see that they were correct. He told me: (1.) that he did not object to the use of a manilla rope, or (2.) to the use of two ropes working on the same winch, or (3.) to lowering one drum during the process of lifting on the other drum. I understood him ultimately to say that he objected to a system which left the details of the lifting and lowering to the discretion of the holder-on, as the holder-on might by wrong exercise of his discretion or negligence cause such friction that any rope, however good, might break in one holding up, say friction for five minutes. But this is not system, but individual fault. The system of trusting to individual discretion universally used had worked without serious accident for nearly thirty years in Liverpool. This system was no doubt sanctioned by the employer, but it did not follow that the employer sanctioned misuse of the system by such holding on as to cause excessive friction. The plaintiff's experts did not object to the system, but to its misuse. The defendants' experienced workers said that to hold on so long as to cause excessive friction while both drums were working was dangerous, but that the length of holding on was left to the discretion of the experienced worker, and he rarely went wrong.

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I have carefully read the evidence and listened to the arguments of counsel, and have come to the conclusion: (1.) that there was no evidence on which the jury could find that the system of leaving the details of working to the discretion of experienced men was dangerous or unsafe. Indeed, the jury have not found it was. (2.) That if the system is taken to include holding on so as to cause excessive and dangerous friction, there is no evidence that such a system, if one can call it so, was negligently sanctioned by any person who can be said to represent the employer. On the question of personal negligence or wilful act, I have already referred to *Fanton* v. *Denville* (1) and *Lennard's* case (2) on this point.

The second group of allegations against the employer was composed of allegations of breaches of statutory regulations —namely, the Docks Regulations, 1925, issued on March 6, 1925, the Workmen's Compensation Act, 1925, coming into force on May 1, 1926. Three breaches were alleged: (1.) that contrary to r. 20 a rope was "used" in lowering not of suitable quality; (2.) that contrary to the same rule a rope was "used" in lowering which was not free from patent defect, and in each case that it was the duty of the owner of the ship to comply with this regulation; and also under r. 44 it was the duty of Elder Dempster & Co., as employers of persons loading, not to "allow" those persons to use ropes which did not comply with r. 20; (3.) that, contrary to r. 30, Elder Dempster & Co., as employers of persons loading, had not complied with that rule which requires that no lifting appliance, that is a rope, should be loaded beyond the safe working load, and in the same capacity had "allowed" the rope to be loaded beyond a safe working load contrary to r. 44.

Two classes of questions arise: Firstly, was there any evidence on which the jury could arrive at the answers they gave? Secondly, what was the liability of the employers as to the facts found?

(1) [1932] 2 K. B. 309.

(2) [1915] A. C. 705.

The jury found that the lowering rope was not of suitable quality. The judge had directed them that "suitable quality" meant "original quality," that is, when it was issued for use. I agree with this view. If "suitable quality" referred to the time when the rope was used to hold the load, in the course of which holding it broke, there would have been no need to say anything about "patent defect." If this direction is correct (and the jury were bound to assume it was) all the evidence was that the rope when issued was a sound manilla 4-inch rope suitable for lifting iron up to a ton weight, its breaking strain being between six and seven tons. I am afraid the answer of the jury must be ascribed to their very natural sympathy with the injured man, and their desire to find everything in his favour; their answer throws doubt as to the correctness of all their findings. This answer of the jury cannot be supported.

The second question relates to a patent defect in the rope. There will be some difficulty about "latent defect" when facts occur which raise the question. But it seems to me that the time to consider "patent defect" is up to the time when the rope begins to be used in one operation. During the operation any rope, however good, may be destroyed by holding on too long, but the destruction would hardly be patent. The jury had before them the evidence of Ainsworth that he had thought the rope was "not too good," and said so, because he had seen scorching and some oil coming out, and the evidence of Hawkins that he had then examined the interior of the rope and found it all right, and had told Ainsworth that there were only two loads more. They had the fact that the rope broke. As four minutes' intense friction might destroy any rope, however good, I do not think I should have found that the rope had a patent defect at the beginning of the four minutes. But I cannot say there was no evidence on which a reasonable jury could find patent defect at the commencement of the operation. If there was such a patent defect, it would clearly contribute to the accident, though it would not be the sole cause of it. But it seems clear that no one representing the employers in the sense I have explained, knew of the defect, so that there was no "personal negligence or wilful act of the employers."

The third statutory breach alleged was loading the rope beyond a safe working load. Again, I think the time to be considered is when the operation commenced. At that time the working load may have been safe, but four minutes holding on may have rapidly deteriorated the rope, which was apparently strong enough to hold the load for four minutes' friction. The evidence as to the actual load was of the slightest. It consisted of a statement of a man named Watts, working in the same gang as the plaintiff, loading gunny bags, that he thought the sling that fell was a heavy load, which he estimated at 25 cwt. Every other witness put the weight at from 15 cwt. to a ton, and the safe loading load of a good 4-inch manilla rope was agreed to be 1 ton to 21 cwt., its breaking strain 6 to 7 tons. I do not think the breaking of the rope after four minutes' holding on is any evidence that the load was unsafe at the beginning of the four minutes. Here again, there is no evidence that the employer, as I have defined him, knew of this unsafe load, or of any personal negligence or wilful act of the employer.

This brings us to the really difficult question in the case. Sect. 29 of the Workmen's Compensation Act, 1925, which came into force on May 1, 1926, or after the issue of the Dock Regulations, 1925, reproduces with modifications immaterial on the point in question, s. 1, sub-s. 2 (*b*), of the Workmen's Compensation Act, 1897, which came into force on July 1, 1898, that is, after the decision of the Court of Appeal in *Groves* v. *Wimborne* (1), given on June 28, 1898. In that case a workman sued his employer for damages to him following on the breach of s. 5 of the Factory and Workshop Act, 1878, as amended by s. 6 of the Factory and Workshop Act, 1891. A dangerous machine had originally been fenced, but some one unknown had removed the fence. Two questions were raised: (1.) Whether the penalty in the Act was the only remedy, or whether there was also an action available to any person suffering injury from the breach of the statute. The latter view was taken. (2.) Whether, if the fence was removed by the negligence of a fellow workman of the injured workman, this was a defence to the employer against his workman's claim on the ground of common employment. It was not suggested that the owner was guilty of any personal negligence or wilful act, but A. L. Smith and Rigby L.JJ. took the view that the action was based on breach of statutory duty, and the negligence of either the master or a fellow servant had nothing to do with this cause of action, and the doctrine of common employment founded on the negligence of a fellow servant was, therefore, inapplicable. This consideration hardly applies when the statutory breach depends on the default by the employee after knowledge requiring action, as in the case where the penalty is for " allowing " : *Massey* v. *Morriss* (1); *Hardcastle* v. *Bielby* (2); *Gully* v. *Smith.* (3) Vaughan Williams L.J., however, said in *Groves* v. *Wimborne* (4): " What one has to consider in the present case, therefore, is whether the defence of common employment can be set up by the defendant here as an answer to this plaintiff's claim for damages. In my opinion it cannot for the following reasons. By s. 5, sub-s. 4, of the Act, a duty is imposed upon the master to constantly maintain the fencing which by the previous part of the section it is made his duty to provide : and I agree that that is an absolute duty, and that it is no answer to an allegation against the master of failure to perform that duty for him to say that he employed a careful and skilful person as his substitute, and the breach of duty was not his fault but that of the person so employed. But, although I entirely agree in that, I wish to guard myself against being supposed to hold that, where there is an absolute statutory duty, the defence of common employment can never under any circumstances be set up. I agree that in the present case it cannot be set up, because on the facts it cannot be said that the injury to the plaintiff was caused by any negligence of a fellow-servant. The injury to the plaintiff in this case was one that was caused by the failure of the master to perform his statutory duty. But, suppose a case in which the master has provided the most perfect and efficient fencing for the machinery that could be, but some person on a particular occasion deliberately leaves the fencing off, or removes it. An obvious answer to an action against the master in such a case would be that the cause of the damage to the plaintiff was not the failure by the master to perform his statutory duty, but the particular action of some one else. I am not satisfied that, if it could be shown that it was a fellow-servant of the person injured whose conduct in so dealing with the fencing was the cause of the injury to the plaintiff, the defence of common employment would not apply." Then again (1): "Similarly I do not, speaking for myself, intend to decide that, if the circumstances of a case were such that, although the master had failed to perform the statutory duty, yet the injury would not have been occasioned to the plaintiff but for the additional fact of negligence on the part of a fellow-servant, that would not be a good defence to the action." Sect. 1 of the Act of 1897 was not referred to in the argument or judgment, for the sufficient reason that, though already enacted, it was not in force till after the date of the judgment. Sect. 1 of that Act dealt with the effect of the extended system of workmen's compensation independent of negligence, and enacted that if the workman used the statutory remedy to judgment he could not also pursue any other civil liability of the employer. It concluded: "The employer . . . . shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid." This referred back to the commencement of the sub-section, which ran: "When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible." Now the employer was not civilly responsible for the act or default of a fellow workman of the injured

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(1) [1898] 2 Q. B. 402.

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(1) [1894] 2 Q. B. 412.
(2) [1892] 1 Q. B. 709.
(3) (1883) 12 Q. B. D. 121.
(4) [1898] 2 Q. B. 402, 418.

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(1) [1898] 2 Q. B. 419.

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man, which caused the injury, by reason of the doctrine of common employment. I am emboldened to say that on the natural meaning of the words at the end of s. 1, now s. 29, the employer is freed from civil liability to his workman for the negligence of a fellow servant by the remarks in *Cribb* v. *Kynoch* (1) of Cozens-Hardy M.R. (2) that the language admits of that construction, and of Kennedy L.J. (3), "If [the language is] read according to its natural meaning." It is true that the remarks in that case were obiter; the question in that case being whether the employer was protected against double proceedings, or only against double payments, a question settled as far as the Court of Appeal is concerned by the subsequent decision of *Bennett* v. *Whitehead.* (4) Curiously enough, the question whether s. 29 of the present Act frees, as it appears to do, the employer from liability to a workman injured by the negligence of a fellow workman without personal negligence or wilful act of the employer, seems never yet to have been considered by any Court which was required or invited to do so. The section was not necessarily involved in the decision in *Cribb* v. *Kynoch* (1); it was not mentioned in *Lees* v. *Dunkerley* (5), or in *Watkins* v. *Naval Colliery Co.* (6), in each of which cases it might have been applicable. In *Bennett* v. *Whitehead* (4), when the question involved was whether the employer was protected against double proceedings or only against double payments, I said, unnecessarily (7): "Looking at the sections themselves, it appears to be clear that the provision of remedies for the workman is not to exclude other remedies against the employer, either at common law or under the Employers' Liability Act, where the employer or his agent has been guilty of negligence or wilful default, but is to exclude such remedies in any other case. 'The employer . . . . shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid': sub-s. 2 (*b*). I think it follows

(1) [1908] 2 K. B. 551.
(2) Ibid. 555.
(3) Ibid. 562.
(4) [1926] 2 K. B. 380.
(5) [1911] A. C. 5.
(6) [1912] A. C. 693.
(7) [1926] 2 K. B. 396.

from this that unless a writ against the employer at common law alleged such personal negligence, or wilful act, it could be stayed as showing no cause of action." In *Higgins* v. *Harrison* (1) a work-girl sued her employer for injuries resulting from breach of statutory duty to fence a dangerous machine. All the members of the Court of Appeal decided against her claim on two sufficient grounds: (1.) that the machine was not dangerous and therefore need not be fenced; (2.) that the claimant was guilty of contributory negligence. But s. 29 of the Act of 1925 was relied on. The three members of the Court took different lines with regard to it. Greer L.J., following the view of Vaughan Williams L.J. in *Groves* v. *Wimborne* (2), held that the claimant was guilty of contributory negligence and that this was a sufficient defence to the action. He reserved any decision as to the effect of s. 29 till the question directly arose and was necessary for decision. I said (3): "There is a great deal to be said for the view (though I am not deciding it finally, in view of the rather odd course the argument of counsel has taken in respect of it) that an action for mere breach of statutory duty is barred by the last sentence of s. 29, sub-s. 1, of the Workmen's Compensation Act. But I am bound to say it looks to me very much as if it was, because I have not heard any intelligible explanation of the last sentence of that section which does not exclude an action for such breach of statutory duty." Slesser L.J. did make the true construction of s. 29 a ground of his decision. He said (4): "I have come to a conclusion, and my view is, taking the language of s. 29, sub-s. 1, and the remainder of the section into careful consideration and the mischiefs to which it was directed, the effect after the passing of that Act is that by that Act it is not possible in cases where a workman is complaining of an accident arising out of and in the course of his employment to proceed in an action for damages successfully for mere breach of statutory duty without negligence. As I read the section, it does preserve a right of action where the injury

(1) 25 B. W. C. C. 113.
(2) [1898] 2 Q. B. 402.
(3) 25 B. W. C. C. 120.
(4) Ibid. 126.

was caused by the personal negligence or wilful act of the employer." I refer to the rest of his judgment without reading it.

We are, in my opinion, now bound to decide what is the effect of the words in s. 29. It is true that in several cases, if the meaning of s. 29 is as argued, there would have been a defence to the action which nevertheless succeeded. I think the reason for this is that judges and counsel have assumed that *Groves* v. *Wimborne* (1) settles the matter, and have overlooked the fact already referred to that the Act of 1897, which first contains the words in question, was not in force when the Court of Appeal decided *Groves* v. *Wimborne.* (1) The relevant words are: "The employer . . . . shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid." This sends us back to the commencement of the section: "When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible." Now at that time, 1897, while the employer was liable for injury to his workman caused by his personal negligence or his wilful default, he was not liable at common law for such injury when caused by the neglect or default of a fellow workman, provided that he, the employer, had used due care to appoint a suitable person to provide proper plant: see the authorities cited in *Fanton* v. *Denville* (2), especially *Wigmore* v. *Jay* (3) and *Feltham* v. *England.* (4) Sect. 29 goes on: "nothing in this Act shall affect any civil liability of the employer, but," and the section proceeds to provide that the workman who recovered under the Act should not recover in civil proceedings against the employer. The section clearly limits the civil liability of the employer in this respect, and it then goes on to use the words: "the employer shall not be liable . . . . to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid." It does not use the words "act or default," which have been

(1) [1898] 2 Q. B. 402.
(2) [1932] 2 K. B. 309.
(3) (1850) 5 Ex. 354.
(4) (1866) L. R. 2 Q. B. 33.

used of the employer's subordinate for whom he is liable, and for whom he may be liable to some third person, not a fellow workman, injured by the act of some one in the employer's service and his agent. The words "personal negligence or wilful act" are not found in the Employers' Liability Act, 1880, but are a new definition and must in my view be taken to define the civil liability of the employer. This view is fortified by the provisions of s. 32 of the Act of 1925, preserving the employer's liability for fines.

My difficulty has been to see what other meaning can be given to these words, which seem to me clear, and to have, as Kennedy L.J. said in *Cribb* v. *Kynoch* (1), an obvious "natural meaning." There seems to me to be a reason for the enactment so construed. The Act of 1897 much enlarged the workman's rights against the employer. It seems not unreasonable that the employer should be protected where he had not been guilty of "personal negligence or wilful act," the workman having still his remedy under the Act. The Act of 1880 had contained no provision against double claims; the Act of 1897 did restrict the workman's civil right in that respect, that he could not recover both in civil proceedings and under the Act, and it may well have given him further protection if he or his alter ego had been guilty of no personal negligence or wilful act.

The argument for the workman was: (1.) that the employer had been guilty of personal negligence, because he had sanctioned a defective system. This point I have already discussed and dealt with. (2.) That he had been guilty of "personal negligence," because he had incurred a statutory penalty for "using" or "allowing." As to "allowing," I can find no case where a man who, without negligence, does not know of a defect has been guilty of "allowing" it, and I think the same view applies to the word "use." "Personal negligence or wilful act" appears a most unlikely phrase to be used of ignorance which is not culpable.

The result is that, subject to any application to be made under s. 29, sub-s. 2, the appeal must be allowed, the judgment below set aside, and judgment entered for the defendants with costs here and below.

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(1) [1908] 2 K. B. 551.

LAWRENCE L.J. It is evident that the findings of fact in this case were greatly influenced, if not entirely induced by the sympathy felt by the jury for the plaintiff and his family owing to the tragic results of the accident. Counsel admitted that the affirmative answer given by the jury to the first question put to them by the learned judge was intended to be a finding that it was part of the system of loading sanctioned by the defendants that the winch should continue to run while a load weighing 15 to 20 cwt. was being held suspended for three to four minutes. From a perusal of the shorthand notes it is apparent that there was no evidence to support that finding. In the first place, the uncontradicted evidence establishes that the system of loading which was being carried out when the accident happened had been in general use at the Liverpool Docks for upwards of thirty years, and had been adopted by the defendants twenty years ago and used by them ever since. There was no evidence, nor was it even suggested, that loading according to this system had led to any accidents in the past. Mr. Panton (the plaintiff's expert witness) said that it was a good system, and, when invited by Mr. Goldie in re-examination to say that it was dangerous, declined to do so. In the next place, the uncontradicted evidence establishes that to hold a load as heavy as 15 to 21 cwt. suspended for three or four minutes whilst the winch is running is very dangerous and would cause even a new rope to burn and break. Mr. Goldie realized the difficulty of upholding the finding of the jury that such a dangerous operation formed part of a system which had prevailed without accident for thirty years, whereupon he contended that a system of loading which permitted the holder-on to use his discretion as to the circumstances under which, and the length of time for which, a load might be held suspended whilst the winch was running was necessarily a dangerous system and that the defendants in sanctioning such a system ought to be held guilty of personal negligence. In my opinion there is no substance in that contention. In the first place, there is no finding that such a system is dangerous, and in the next place it is established by the evidence that it frequently happens that a load has for some reason or other to be held in suspense for a short period, and that when this occurs it is left to the discretion of the holder-on whether to stop the winch or let it run on. So long as the defendants employ reliable and competent workmen to operate the system they cannot, in my opinion, be held liable for personal negligence if an accident should happen owing to the carelessness or neglect of one of their workmen. It is clear on the evidence that the system which the defendants have in fact employed and sanctioned is wholly unobjectionable.

The next two questions submitted to the jury were intended to elicit whether or not the allegation that the defendants had been guilty of a breach of the Docks Regulations, 1925, made under the Factory and Workshop Act, 1901, was well founded. Regulation 20 provides that no rope shall be used in hoisting or lowering unless it is of suitable quality and free from patent defect. In answer to question 2 the jury found that the rope which was being used when the accident happened was neither of suitable quality nor free from patent defect.

The learned judge directed the jury that on the true construction of this Regulation "suitable quality" meant originally of suitable quality, that is to say, that in order to comply with the Regulation it is sufficient if the rope is of suitable quality when issued from the store. In my opinion, the construction so placed upon the Regulation by the learned judge is right. The evidence showed that the rope in question in the present case had been manufactured by an old established and reputable firm of rope manufacturers; that it was a 4-inch manilla rope with a breaking strain of 6½ tons; and that its safe working load was about 21 cwt.; in other words, that when issued from the store it was in all respects fit for the job for which it was intended to be used. Notwithstanding the direction of the learned judge and the uncontradicted evidence as to quality of the rope, the jury found that the rope was not of suitable quality. This finding plainly shows that the jury paid scant regard to the direction of the learned judge and to the evidence adduced at the trial. In my opinion, there was no evidence to support this finding.

The next finding was that the rope was not free from patent defect. Whether there was any evidence to support this finding is more doubtful. This depends partly upon what is meant by "patent defect," and partly upon what was the condition of the rope immediately before it was used to lower the load which was being held suspended when it broke. In ordinary parlance "patent" means "visible" or "obvious" in contradistinction to "latent" or "dubious"; and the word "defect" in the context in which it is used in my opinion means some fault which would or might impair its efficiency for the job in hand. The evidence is that mere heating and surface scorching does not render a rope defective in the sense I have indicated, but that burning does; that a rope has to be examined in order to see whether it is merely scorched or whether it is burnt; that Ainsworth (a very experienced holder-on) was uncertain whether the rope in question was defective or not, and requested Hawkins (a very experienced hold foreman) to examine it; that Hawkins accordingly examined it and did not discover any signs of burning; and lastly, that the treatment which the rope was receiving when it broke would have caused an entirely new rope to break. For myself I should have thought that the evidence given by Ainsworth (a witness called by the plaintiff) that he asked Hawkins to examine the rope in order to find out whether it was defective or not showed conclusively that so far as he was concerned there was no "patent defect." Further, the evidence of Hawkins that he opened up and examined the rope and did not see any defect in it in my opinion showed that so far as he was concerned there was no "patent defect." I cannot readily conceive that such experienced and trusted workmen as Hawkins (who had been in the employment of the defendants for thirty years) and Ainsworth (who had been in the employment of the defendants for twenty-three years) should have passed a rope as fit for use, and used a rope, if it was not free from a patent defect, and thereby jeopardized the lives of their fellow workmen. However, I realize that this is a question to be decided by the jury and not by myself, and that I must assume that the jury understood the meaning of the expression "patent defect." In view, therefore, of the evidence given by Mr. Panton, the plaintiff's expert, before the distinction between mere scorching and burning had emerged, and in view of the warning given by Ainsworth to the men working in the hatch and of the statement made by Hawkins that there were only a couple more loads to be lowered, I am not prepared to differ from the view taken by my colleagues that there was some evidence upon which a reasonable jury could find that the rope was not free from a patent defect, though I confess that I still have considerable doubt whether the evidence does not at most go to show that Ainsworth and Hawkins were doubtful as to whether the rope was defective or not.

There remains the third finding of the jury that the rope was loaded beyond its safe working load in breach of Regulation 30. In my opinion this finding was clearly against the weight of evidence. The safe working load referred to in this Regulation must, I think, mean the safe working load of the rope when issued from the store and which load would remain constant during the life of the rope. The very object of fixing the safe working load at one-sixth of the breaking strain is to allow for wear and tear during use. It would be practically impossible to test the rope before each load was attached to it in order to ascertain whether its safe working load had decreased. In the present case the three men who were peculiarly qualified to speak to the weight of the load—namely, Ainsworth, Corran and Hawkins—estimated the load at the crucial time at well under 21 cwts., which was the safe working load for the rope. The highest estimate of the weight of the load given by these three witnesses was that given by Ainsworth on behalf of the plaintiff—namely, " about a ton " ; the other two witnesses giving it as 15 and 16 cwts. respectively. As against this evidence there was only the statement made by Watts, who was a labourer helping the plaintiff to stow away gunny bags on the 'tween deck when the accident happened. It does not appear what qualification Watts had to enable him to give any reliable estimate of the weight of the load. Moreover, all Watts said was that he considered that it was a heavy load and that he agreed with Ainsworth that it probably weighed about a ton, or possibly a little more ; and that he estimated it at about 25 cwts. In these circumstances I am clearly of opinion that there was no evidence upon which a reasonable jury could find that the rope was loaded beyond its safe working load.

This brings me to the question which has arisen under s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925. This section is perhaps not worded as clearly as it might have been, but if the language used to express its provisions is read in its natural meaning, its construction does not seem to me to present any real difficulty. So far as relevant to the present case, the section provides in the first instance that when the injury to a workman is caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in the Act shall affect any civil liability of the employer. This provision standing by itself, and applying the maxim " expressio unius est exclusio alterius," might well be held to mean that the Act was intended to relieve the employer from liability at common law in cases where the injury was not caused by the personal negligence or wilful act of the employer, or of some person, etc. Any doubt, however, as to whether that was the true meaning of this provision is removed by the express enactment at the end of the section that the employer was not to be liable to any proceedings independently of the Act, except in case of such negligence or wilful act as aforesaid.

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I find it impossible to give any other meaning to the concluding words of the section than that it operates to relieve an employer from all civil liability at common law for injury sustained by a workman as the result of an accident arising out of and in the course of his employment, except in cases where the injury has been caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible. This view of the effect of the section is confirmed by s. 32 of the Act, which provides that nothing in the Act shall affect any proceedings for a fine under the enactments relating to mines, factories or workshops. Unless the effect of s. 29 be to prevent civil proceedings being taken by a workman against his employers for breach of his statutory duty under the Acts mentioned in s. 32, it is difficult to explain the reason for expressly preserving the liability of the employers for penalties for such breaches.

Mr. Goldie contended with much force that if that be the true effect of the section many cases (including two which went to the House of Lords—namely, *Britannic Merthyr Coal Co.* v. *David* (1) and *Watkins* v. *Naval Colliery Co.* (2)) in which an employer had been held liable for damages at common law, although no personal negligence or wilful act on his part was proved, ought to have been decided the other way. That is no doubt true, but in none of these cases was s. 29 of the Act, or the corresponding section in the earlier Acts, relied upon by the employers, or referred to in any way. Whether this omission was due to the mistaken notion that the case of *Groves* v. *Wimborne* (3) had been decided after the corresponding section in the 1897 Act had come into force, or whether it was due to an oversight, it is impossible to say. However that may be, this Court is now called upon to construe the section, and being unfettered by any decisions determining its construction, is free to place upon it what it considers to be the true construction.

(1) [1910] A. C. 74.
(2) [1912] A. C. 693.
(3) [1898] 2 Q. B. 402.

The only two cases, which I know of, where the section has been judicially considered, are *Bennett* v. *Whitehead* (1) and *Higgins* v. *Harrison*. (2) Although it was not necessary in either of those cases to decide the question, Scrutton L.J. in both cases, and Slesser L.J. in the latter case, expressed the opinion that the section meant what, as already stated, I consider to be its true meaning.

It remains to apply the section to the facts of the present case. It is well settled and not disputed that under the doctrine of common employment the defendants are not liable for the injury sustained by the plaintiff owing to the negligence of his fellow workman, Ainsworth; therefore, in order to succeed in this action, the plaintiff had to prove that his injury was caused by the personal negligence or wilful act of the defendants, or of some person for whose acts or default the defendants were responsible. As the defendants are a limited company, this onus would be discharged by proving that the injury was caused by the personal negligence or wilful act of some person acting for the defendants, other than a fellow workman of the plaintiff, such as, e.g., the managing director or the general manager, or other person having authority from the board of directors to conduct the company's business.

It was doubtless in view of this difficulty that the plaintiff sought to prove that the defendants had sanctioned a system which he alleged contained a dangerous element. Having failed to sustain the finding of the jury in answer to the first question, it follows in my opinion that the plaintiff's case that his injury was caused by the personal negligence or wilful act of the defendants breaks down.

The other grounds of claim are in a different category, and consist of alleged breaches of statutory regulations; moreover, the only case in which in my opinion such a breach can be said to have been established is the case of using a rope with a patent defect contrary to Regulation 20. Although that regulation imposes an absolute duty on the defendants and they are not relieved from proceedings for statutory

(1) [1926] 2 K. B. 380.
(2) 25 B. W. C. C. 113.

penalties for the breach of that regulation (see s. 32 of the Act of 1925), yet the mere fact that they have committed a breach of the Regulations does not establish that they were personally negligent or guilty of a wilful act. It is not proved, or even suggested, that the defendants knew of, or were in any way parties or privy to, any breach of the Regulations. The difference between negligence and breach of statutory duty was clearly pointed out in *Groves* v. *Wimborne* (1) and other cases, and there is no necessity to repeat what was there said on this point.

If I am right in my view of the true meaning and effect of s. 29, sub-s. 1, it follows that it affords a complete defence to any claim for damages based on a breach or breaches of the statutory regulations.

In the result, for the reason stated, I agree that this appeal should be allowed.

GREER L.J. This is the defendants' appeal from a verdict and judgment for 3000*l*. damages for personal injuries suffered by the plaintiff as the result of the fall of a bundle of angle irons while they were being loaded on board the defendants' motor vessel, the *Macgregor Laird*, in the Harrington Dock at Liverpool. The plaintiff was a dock labourer in the employ of the defendants when he received the injuries in respect of which the action was brought. At first the results of the accident appeared to be slight, but afterwards they became very serious, and no complaint is made in this appeal that the damages were too large. The plaintiff was working in the lower hold of No. 4 hatch, when a bundle of angle irons fell into the hold and caused the injuries for which he claimed to be compensated by damages.

As the plaintiff's case was shaped at the trial, three distinct causes of action were alleged: (1.) a defective or unsafe system of work sanctioned by the defendant company, which involved the winch continuing to run while the load was being suspended, for a period of three to four minutes, during which the holder-on, Ainsworth, was waiting for a

(1) [1898] 2 Q. B. 402.

signal that the men on the lower deck, where it was to be stowed, were ready to receive and stow it; (2.) the breach by the defendants of Regulation No. 20 in Part III. of the Docks Regulations, 1925, made by the Secretary of State under s. 79 of the Factory and Workshop Act, 1901; (3.) the breach by the defendants of No. 30 in Part IV. of the said Regulations. Regulations Nos. 20 and 30, so far as material, are in the words following: "(20.) No rope shall be used in hoisting or lowering unless (1.) it is of suitable quality and free from patent defect." "(30.) No machinery, chains or other lifting appliance shall be loaded beyond the safe working load."

It is provided in the earlier part of the Regulations, under the head of "Duties," that it shall be the duty of the owner of machinery or plant to comply with Part III. of the Regulations, and that it shall be the duty of every person who by himself or his agent or workmen carries on the processes . . . . to comply with Part IV. of the Regulations. The defendants load their ships by their own plant and their own workmen, and therefore Regulations Nos. 20 and 30 impose absolute duties on them. The winch used for loading No. 4 hold consisted of a derrick with two arms. Each of these arms did its work by means of a rope passing round a drum. The drums were at the rear of the hatch, one on the starboard side and one on the port side. If, as in this case, the starboard drum was being used for lifting parcels of cargo from barge or quay on to the ship, the port drum was used at the same time for lowering parcels of cargo which had already been deposited on deck, into the appropriate part of the vessel where they were to be stowed. If cargo was being loaded on the starboard side the drum would necessarily be revolving in the direction required to lift the various parcels, while the port drum would be revolving in the same way, and could be used as a brake retarding and controlling the descent of the parcel by its own weight into the hold. This was done by taking four turns of the rope round the drum and having a workman called a "holder-on" standing behind the drum to take hold of the rope and pay it out slowly so as to enable the parcel to descend safely by its own weight. This meant using the drum as a brake operating by friction between the drum and the rope and controlled by the holder-on. If for any reason the parcel had to be held stationary during its descent, the effect of friction would be greatly accentuated. The weight at one end and the holder-on at the other would keep the four coils of rope in position on the drum while the latter continued to revolve, thus subjecting these four coils to continued friction until the rope began to be paid out once more so as to enable the parcel to resume its downward journey into the hold. It seems plain that if the same part of the rope was kept taut on the drum too long a time, the friction would set up great heat and the rope might be damaged by burning. The practice of those who looked after the loading operations for the defendants was to authorize the holder-on to give an order to the winchman to stop the winch whenever he thought there was a risk of the rope burning.

According to the evidence, the system of doing the work in this way had been going on for twenty or thirty years, and there was no evidence or suggestion that this system had ever resulted in an accident before. No doubt the system involved the risk of an accident if the trusted and experienced holder-on did his part negligently, but it is impossible to name, or indeed to imagine, any system of loading or discharging cargo into or from a ship which does not become dangerous if the men who carry it out are negligent. Tackle has to be used, and tackle will wear out, and there comes a time when some employee has to be trusted to say that the tackle has become so worn that it is unsafe to use it any longer. If such a trusted employee is negligent, his employer is not responsible to a fellow workman who is injured thereby. Further, if the plant or system of work be in itself dangerous even when carefully operated, the employer can be made responsible only if it be shown that he himself has been negligent in personally installing the plant, or putting the system into operation, or maintaining the plant or system after its defects have been brought to his knowledge and he has allowed it to continue. If the system has been put into operation and is being carried out by his servants on his behalf, and he is not proved to have left the work to incompetent servants, he is not responsible to his workpeople for injuries thereby caused. He is free from liability unless it be proved that the injuries complained of were caused by his own negligence or wilful act: see the judgment of this Court in *Fanton* v. *Denville* (1), and the numerous cases cited in that judgment.

The trial judge asked the jury to answer three questions: (1.) Was it part of the system of loading sanctioned by the defendant company that the winch should continue to run while the load was being held suspended as in this case? (2.) Was the rope of suitable quality and free from patent defect when used to lower the last load? If No, did such defect contribute to the breaking of the rope? (3.) Was the rope loaded beyond its safe working load? If Yes, did this contribute to the breaking of the rope? The jury gave the following answers to the questions: (1.) Yes. (2.) Not suitable. Not free from defect. And to the second part of this question, Yes, and similar answers to the third question.

The first question means, I think: "Was it part of the system that the winch should continue to run during the time, whatever the extent of that time might be, when the load was being suspended." If it was proved that there was such a system of work sanctioned by the defendant company, I can understand why the question contains no reference to negligence on the part of those responsible for working a system of that kind. I do not suppose it was, or could have been, contended on behalf of the defendants, that if that was the system, and the defendants were responsible for it, they would not have been liable in this action. If there was evidence that the system did involve the continuance of the winch for a period of three or four minutes, there could be no doubt that this would be an unsafe system, and if it could be said that the initiation and carrying on of such a system was due to the negligence

(1) [1932] 2 K. B. 309.

of the directors of the defendant company (or possibly of the general manager), the company would be liable. In my judgment, however, there was no evidence that it was part of the system that the winch should be run as long as it was necessary for the load to be held suspended. According to the evidence, the system was to trust an experienced workman, who might be reasonably expected to be careful of the lives and limbs of his fellow workmen, to order the winch to be stopped as soon as it appeared to be dangerous to allow it to continue running. Be this as it may, it is beyond question that there was no evidence that the directors of the company, or their general manager, or any person in their employ, who was not a fellow workman with the plaintiff within the doctrine of common employment, had anything to do with the initiation or carrying out of the alleged defective system. There was, therefore, no evidence on which the verdict of the jury on the first question can be supported.

With regard to the jury's answer to the second question, I think there was evidence that when the load which caused the accident was being lowered, the rope used was not free from patent defect, and the jury were entitled to answer the second part of question 2 as they did. I do not feel sure that they were wrong in saying that the rope at this time was not of suitable quality. I am inclined to think they were wrong, but this is immaterial if they were right in saying that it was not free from a patent defect.

With regard to the answer to the third question, I think the rope was not loaded beyond its safe working load within the meaning of Regulation 30 of Part IV. According to the evidence, a safe working load for a 4-inch rope is one-sixth of its breaking strain. Decided by this test, the safe working load of the rope in question was 21 cwt., or, as some of the witnesses put it, roughly 1 ton. I think the regulation must be read as referring to a safe working load which can be known to those using the rope as an ascertained figure. It does not mean that a calculation is to be made from day to day or from hour to hour during the life of the rope, as it

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would be impossible in practice to make such a calculation. I take it that the safe working load is fixed at so low a figure as one-sixth of the breaking strain because it is known the strength of the rope will necessarily be affected in its use, and therefore it is necessary to have a large margin between the breaking strain and the safe working load. The protection of the men against deterioration of the rope is provided for by Regulation 20. I therefore think there was no evidence on which the jury could have answered question 3 as they did. I disregard the evidence of the man Watts, because all he said was that the weight was either 1 ton or 25 cwts., and that is not any evidence that it was more than a ton, but, however this may be, it is unimportant, because if they were right in their answer to question 2, and the liability of the defendants is not affected by the concluding words of s. 29 of the Workmen's Compensation Act, the plaintiff would be entitled to retain the verdict on the ground that his injuries were caused by a breach of an absolute statutory obligation imposed on his employers for his benefit: *Groves* v. *Wimborne.* (1)

The appellants, by their statement of defence, pleaded that the plaintiff's action was not maintainable by reason of s. 29 of the Workmen's Compensation Act, 1925, and they contended at the trial, and before us, that that section relieved them from liability for a breach of the absolute obligation imposed by the Factory Act and the Regulations made thereunder. The section reads as follows: "When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid." I propose to consider the meaning of the section in the first instance apart from authority. At common law the employer is liable to his workmen for his own negligence or wilful act, but not for the negligence of his servants unless he has failed to exercise due care in selecting competent servants. He is also responsible at common law for the breach of the absolute duties imposed upon him by certain statutes, including the Factory Act and the Regulations made thereunder, whether he be personally negligent or not. He is responsible under the Employers' Liability Act, 1880, for the negligent or wilful act of certain of his servants exercising superintendence in the capacities mentioned in ss. 1 and 2 of the Act.

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(1) [1898] 2 Q. B. 402.

It will be seen that the common law liability of the employer was greatly enlarged by the Employers' Liability Act, but the Act, in s. 3, enacted a limit to the amount of damages recoverable, and special provision was made as to the Court in which proceedings should be taken to recover these damages. This statute left the common law remedies recoverable by an ordinary action for negligence exactly as they were independently of the Act, but it is necessary to refer to the Employers' Liability Act to explain the reference in s. 29 of the Workmen's Compensation Act, 1925, to the negligence or wilful act of some person for whose act or default the employer is responsible. The first part of s. 29 of the Workmen's Compensation Act, 1925, provides that the Act is not to affect either the common law liability of the employer for his own personal negligence or wilful act, or his liability to be sued by appropriate proceedings for the limited damages provided for by the Employers' Liability Act occasioned by the negligence of persons and superintendence mentioned in that Act. It is arguable that even without the last words of the section the statute would have had the effect of leaving open to the workman the opportunity of proceeding at common law only in cases where the injury was caused by the personal negligence or wilful act of the employer, or such other person as is mentioned, but however this may be, it seems to me impossible to hold that the final words of the section "and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid" can be construed otherwise than as a provision that except in the case of personal negligence or the wilful act of the employer, and of proceedings under the Employers' Liability Act, the workman is prohibited from taking proceedings by action independently of the Workmen's Compensation Act. I do not think personal negligence or wilful act can be held to include the failure to perform an absolute statutory duty. The words seem to indicate that what is being preserved to the workman is the right to complain of something wrong which is either the wilful, that is, intentional, act of the employer, or is personal negligence in the sense of a failure on the part of the employer to exercise reasonable care. That this is the true meaning is supported by considering s. 32 of the Act, which provides that nothing in the Act shall affect any proceeding for a fine under the enactments relating to mines, factories or workshops, or the application of any such fine. Sect. 32 appears to have been inserted in the Act on the assumption that some part of the Act does affect proceedings under the enactments relating to mines, factories or workshops, and then proceeds to make it clear that the Act is not to affect proceedings for fines notwithstanding the fact that there is power to provide that some part of the fine shall go to the workman. Sect. 32 would be quite unnecessary if s. 29 had no effect in restricting proceedings independently of the Act based on the employer's failure to perform the duties imposed by the enactments relating to mines, factories or workshops.

As to the authorities, the question in *Groves* v. *Wimborne* (1) arose with regard to an accident which happened before the first Workmen's Compensation Act was passed, and the provisions contained in that Act could not have been put forward as a defence. Sect. 1, sub-s. 2 (*b*), of the first Workmen's Compensation Act, 1897, which came

(1) [1898] 2 Q. B. 402.

into operation on July 1, 1898, contained provisions similar in substance though not in words to those contained in s. 29 of the Act of 1925. The Workmen's Compensation Act, 1906, which came into operation on July 1, 1907, contains in s. 1, sub-s. 2 (*b*), provisions identical with those in s. 29, sub-s. 1, of the 1925 Act.

There have been many actions brought at common law for damages for breach of statutory obligations between July 1, 1898, while the 1897 Act was in force, and July 1, 1907, and while the 1906 Act was in force, and since the Act of 1925 came into force, but on no occasion has the relevant section ever been relied upon as an answer to the claim. Two at least of these cases reached the House of Lords, *Britannic Merthyr Coal Co.* v. *David* (1) and *Watkins* v. *Naval Colliery Co.* (2) If I have rightly construed the words of s. 29, and the relevant part of the Workmen's Compensation Act in force in December, 1907, when the explosion on which the claim was based in the first of these cases took place, the 1906 Act would, if relied upon, have been an answer to the claim. The point was not taken, and I do not think that case can be regarded as an authority in favour of the plaintiff's contention. *Watkins* v. *Naval Colliery Co.* (2), above referred to, is another case where a common law claim based upon the breach of an absolute statutory duty succeeded in a Court of first instance and in the House of Lords, where it was argued by eminent counsel, but the point as to the effect of s. 1, sub-s. 2 (*b*), of the Workmen's Compensation Act was not raised either by counsel or by any of the judges who heard the case. There are other cases, both reported and unreported, in which the defence could have been relied upon if it had been raised, but I do not think we ought to regard any of these cases as involving a decision on a point of law which was not raised or considered by the tribunals called upon to decide the cases.

Though referred to incidentally in some earlier cases, the point was first definitely suggested in *Higgins* v. *Harrison* (3),

(1) [1910] A. C. 74.

(2) [1912] A. C. 693.

(3) 25 B. W. C. C. 113.

where Scrutton and Slesser L.JJ. expressed the opinion that a common law action for damages based on a breach of a statutory duty where there was no personal negligence or wilful act of the employer was not maintainable by reason of s. 29 of the Workmen's Compensation Act, 1925. I was a party to the judgment in that case, but did not think it necessary to express any view on the point.

In the present case s. 29 was expressly relied on in the defence. I have been unable to resist the argument that it is fatal to the plaintiff's case, and accordingly I agree that the appeal should be allowed and judgment entered for the defendants.

Appeal allowed.

Solicitors for appellants: *Lawrence Jones & Co., for Forwood, Williams & Grindrod, Liverpool.*

Solicitors for respondent: *Helder, Roberts, Giles & Co., for J. A. Behn, Liverpool.*

J. S. H.

ST. JAMES' AND PALL MALL ELECTRIC LIGHT COMPANY, LIMITED *v.* CITY OF WESTMINSTER ASSESSMENT COMMITTEE AND ANOTHER.

K. B. D.
1932
May 11, 12, 26.

C. A.
Nov. 8, 9, 10, 11, 14, 15;
Dec. 19.

Rates and Rating—Electricity Supply Undertaking—Sinking Funds provided from Revenue—Assessment—Basis of Valuation of Hereditaments—Profits Basis Method of Valuation—Exclusion of Contributions to Sinking Funds.

Before the passing of the London Electricity (No. 2) Act, 1925, the London County Council was empowered to purchase compulsorily the undertaking of the St. James' Co. in 1931, or at the expiration of any subsequent period of ten years. The Electricity (Supply) Acts, 1919 and 1922, provided for the establishment of a Joint Electricity Authority and for the transfer to that Authority of the rights of purchase vested in the London County Council, and by the London and Home Counties Electricity District Order, 1925, the London and Home Counties Joint Electricity Authority was established. The London Electricity (No. 2) Act, 1925, gave statutory effect to an agreement dated May 27, 1924, between the London County Council and other parties, providing for the transfer of the St. James' Co.'s undertaking to the Joint Electricity Authority on December 31, 1971, on the terms (inter alia) that on such transfer such of " the physical assets " (which were defined as the lands, buildings, works, machinery, plant, mains, apparatus, appliances and other like property) as formed part of the undertaking and as should have been in use, or available and suitable for use, at the date of the establishment of the Joint Electricity Authority, should be transferred to that Authority free of charge, and such of the physical assets as should have been provided subsequently should be paid for by the Joint Electricity Authority. It was further provided that the St. James' Co. should provide a sinking fund A, by setting aside annually out of their revenue such sums as, with interest thereon, would be sufficient to liquidate the value of any physical assets which became transferable to the Joint Electricity Authority free of charge, and to liquidate any other sums being at the date of the establishment of the Joint Electricity Authority capital properly expended by the St. James' Co., and also a sinking fund B, which would be sufficient to liquidate the cost of any assets provided by the St. James' Co. and any other expenditure properly chargeable to capital account which might be incurred after the establishment of the Joint Electricity Authority. On the transfer of the undertaking to the Authority these sinking funds were to be retained by the St. James' Co., and the physical assets which they replaced were throughout treated as belonging to the capital account of the St. James' Co. :—

Held, by the Court of Appeal (reversing the decision of the Divisional Court), that in arriving at the gross and rateable values of the hereditaments occupied by the St. James' Co., the sums which they were required to set aside for the sinking funds should not be excluded from their receipts or allowed as a deduction therefrom.

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St. James' and Pall Mall Electric Light Co. v. City of Westminster Assessment Committee.

Case stated under the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 40.

The St. James' and Pall Mall Electric Light Company, Ld. (hereinafter called "the St. James' Co."), gave notice of appeal from a decision of the City of Westminster Assessment Committee in respect of the rating of hereditaments, consisting of land, buildings, machinery, mains, services, supply wires and other appurtenances for the supply of electricity, of which they were the owners and occupiers. They claimed that the gross and rateable values shown in the valuation list should be reduced from 110,001*l.* and 55,001*l.*, respectively, to 72,664*l.* and 36,332*l.*, respectively.

The Assessment Committee rejected the contention put forward by the St. James' Co. and fixed the gross and rateable value of the hereditaments at 89,922*l.* and 44,961*l.* respectively.

The St. James' Co.'s undertaking was situated entirely within the City of Westminster, and was, at all material times, carried on for profit by virtue of the powers conferred, and subject to the conditions imposed, by (inter alia) the Electricity (Supply) Acts, 1882–1926, the London Electric Supply Act, 1910 (10 Edw. 7 and 1 Geo. 5, c. cxl.), and the London Electricity (No. 2) Act, 1925 (15 & 16 Geo. 5, c. lxiii.). By a Provisional Order made by the Board of Trade under the Electric Lighting Acts, 1882 and 1888, and duly confirmed by the Electric Lighting Orders Confirmation (No. 9) Act, 1890 (53 & 54 Vict. c. cxciv.), the St. James' Co. were authorized to supply electrical energy throughout that part of the City of Westminster which formerly constituted the parish of St. James', Westminster.

Before the passing of the London Electricity (No. 2) Act, 1925, the London County Council was empowered to purchase compulsorily the undertaking of the St. James' Co. in 1931, or at the expiration of any subsequent period of ten years. The Electricity (Supply) Acts, 1919 and 1922, provided for the establishment of a Joint Electricity Authority and for the transfer to that Authority of the rights of purchase vested in the London County Council, and by the London and

Home Counties Electricity District Order, 1925, the London and Home Counties Joint Electricity Authority was established.

The London Electricity (No. 2) Act, 1925, provided for the regulation of the revenue and dividends of the St. James' Co. and certain other London electricity supply undertakings, and gave statutory effect to an agreement dated May 27, 1924, between the London County Council and other parties, providing for the transfer of the St. James' Co.'s undertaking to the Joint Electricity Authority on December 31, 1971, on the terms provided for in the agreement of May 27, 1924. Those terms, so far as material, were that on such transfer such of "the physical assets" which were defined as the lands, buildings, works, machinery, plant, mains, apparatus, appliances and other like property) as formed part of the undertaking and as should have been in use, or available and suitable for use, at the date of the establishment of the Joint Electricity Authority, should be transferred to that Authority free of charge, and such of the physical assets as should have been provided subsequently should be paid for by the Joint Electricity Authority. It was further provided that the St. James' Co. should provide a sinking fund A, by setting aside annually out of their revenue such sums as, with interest thereon, would be sufficient to liquidate the value of any physical assets which became transferable to the Joint Electricity Authority free of charge, and to liquidate any other sums being at the date of the establishment of the Joint Electricity Authority capital properly expended by the St. James' Co., and also a sinking fund B, which would be sufficient to liquidate the cost of any assets provided by the St. James' Co. and any other expenditure properly chargeable to capital account which might be incurred after the establishment of the Joint Electricity Authority. On the transfer of the undertaking to the Authority these sinking funds were to be retained by the St. James' Co., and the physical assets which they replaced were throughout treated as belonging to the capital account of the St. James' Co.

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St. James' and Pall Mall Electric Light Co. v. City of Westminster Assessment Committee.

The St. James' Co. contended that, in arriving at the gross and rateable values of the hereditaments, the sums which they were required to set aside for the sinking funds should be excluded from their receipts or allowed as a deduction therefrom.

The question for the opinion of the Court was whether that contention was correct in law.

Wilfrid Greene K.C. and *Colin H. Pearson* for the St. James' Co. That portion of the St. James' Co.'s revenue which is collected to finance the sinking funds should not be taken into account in arriving at the gross and rateable values of the hereditaments. The hypothetical tenant can derive no benefit from the sinking funds. In calculating the profits which he, as tenant, may expect to receive from the occupation of the hereditaments he will exclude the contributions to the sinking funds and interest. Therefore, that portion of the receipts of the undertaking which the St. James' Co. are under obligation to set aside to provide such contributions should be excluded in arriving at the rent which the hypothetical tenant ought to pay. The object of the Scheme in this case is to enable the company to have in hand a fund as capital for distribution instead of the purchase price. The company is thus building up a sum which will take the place of cash payable under their agreement with the Joint Electricity Board. This should not be treated as profits. The method of assessment is explained in *Kingston Union Assessment Committee* v. *Metropolitan Water Board* (1) and *Port of London Authority* v. *Orsett Union Assessment Committee.* (2) In the hands of the hypothetical tenant the sum so built up is not profit, but a sum applicable to discharge a loan raised to acquire the hereditaments. In *Merthyr Tydfil Local Board of Health* v. *Merthyr Tydfil Union Assessment Committee* (3) it was held that a sum paid out of general district rates by the local board to acquire waterworks was not to be included in the assessment to poor rate; for it was received on terms with regard to repayment which prevented it from being

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(1) [1926] A. C. 331.

(2) [1920] A. C. 273.

(3) [1891] 1 Q. B. 186.

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profit. The distinction to be observed is between profits available to the tenant and profits with which the tenant has no concern. The Joint Electricity Board is getting the benefit of these payments, because in 1971 they will get the assets for nothing. There is no benefit to the landlord or to the hypothetical tenant. The assessment is wrong and should be amended.

Tyldesley Jones K.C. and *Harold Murphy* for the respondents, the Assessment Committee of the City of Westminster. Before 1925 the London Electric Lighting Companies were not limited with regard to the payment of dividends but only with regard to prices. By the Act of 1925 they were limited with regard to dividends, and it was provided that in 1971 they should hand over their assets "free of charge" to the Joint Electricity Authority. Their statutory obligation is to provide sinking funds which, at the end of forty years, will pay off the shareholders' capital. This is provided out of the receipts of the business. If the profits only reach the landlord through the pockets of the hypothetical tenant that is enough to render them liable to inclusion for assessment. No portion of the receipts of the St. James' Co.'s business is earmarked, but the landlord must provide the sinking funds out of revenue. In these circumstances no allowance ought to be made for the contributions to the sinking funds. These moneys never go to the landlord except in the form of rent. An analogous case is that of the purchase of a water undertaking by a local authority. The moneys there put aside to pay for the undertaking are not deducted in estimating the rent paid by the hypothetical tenant. In *Metropolitan Water Board* v. *St. Marylebone Assessment Committee* (1) the Divisional Court was of opinion that a statutory power in the hypothetical tenant to raise a rate to meet a deficiency was a matter to be taken into consideration in arriving at the rateable value, and that the rateable value might be increased in a proper case in this respect by the addition of an appropriate percentage. It is only if

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(1) [1923] 1 K. B. 86.

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payment is to be made for water or electricity that it becomes material to consider whether money is being raised for the purposes of the landlord or of the tenant. If it is received for the supply of water or electricity, the ultimate destination of the money is immaterial. In *Kingston Union Assessment Committee* v. *Metropolitan Water Board* (1) Lord Cave mentions possible deductions, but these do not include a sinking fund. A sinking fund cannot be deducted from the gross receipts of the undertaking. It has never been held that because charges are increased to provide a sinking fund they are not part of the gross profits of the hypothetical tenant. In *Metropolitan Water Board* v. *St. Marylebone Assessment Committee* (2) the question was whether the deficiency rate did in fact reach the hypothetical tenant. The true and only test is whether the money is received here for the supply of electricity. If it is, then it forms part of the gross receipts and must be included for assessment.

Cur. adv. vult.

May 26. Lord Hewart C.J. In this case I have had the opportunity of reading the judgment which is about to be delivered by Avory J., and I concur in it.

Avory J. Before the passing of the London Electricity (No. 2) Act, 1925, the London County Council was empowered to purchase compulsorily the undertaking of the appellants, in the year 1931, or at the expiration of any subsequent period of ten years, and any sum of money paid as the purchase price would have been received by the appellants, as owners or landlords, and no hypothetical tenant would have had any interest in it.

The effect of the Act of 1925, and the agreement of May 27, 1924, which is incorporated in it, is to substitute for that compulsory purchase a Scheme whereby the undertaking of the appellants is to be transferred to the Joint Electricity Authority named in the Act on December 31, 1971, on the terms provided for in the agreement of May, 1924, which terms, so far as material, are that on the transfer such of "the physical assets" (which are defined as the lands, buildings, works, machinery, plant, mains, apparatus, appliances and other like property) as form part of the undertaking, and as shall have been in use, or available and suitable for use, at the date of the establishment of the Joint Electricity Authority, shall be transferred to the Joint Electricity Authority, free of charge, and such of the physical assets as shall have been provided subsequently, shall be paid for by the Joint Electricity Authority by a sum equal to the amount expended in providing such assets, less the amount standing to the credit of sinking fund B hereinafter mentioned. It was further provided by the agreement that the appellants should provide a sinking fund A by setting aside annually out of their revenue such sums as with interest thereon will be sufficient to liquidate the value of any physical assets which become transferable to the Joint Electricity Authority free of charge and to liquidate any other sums, being at the date of the establishment of the Joint Electricity Authority capital properly expended by the appellants, and also a sinking fund B which will be sufficient to liquidate the cost of any assets provided by the appellants and any other expenditure properly chargeable to capital account which may be incurred after the establishment of the Joint Electricity Authority. On the transfer of the undertaking to the Authority these sinking funds are to be retained by the appellants, and the physical assets which they replace are throughout treated as belonging to the capital account of the appellants.

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(1) [1926] A. C. 331, 339.

(2) [1923] 1 K. B. 86.

In these circumstances, the question for determination on this special case is whether the portion of the appellants' revenues which is collected to finance the sinking funds should be taken into account in arriving at the gross and rateable values of the hereditaments in question; in other words, whether the hypothetical tenant from year to year, who can derive no benefit from these sinking funds, in calculating the profit to be derived by him as tenant would take into account that portion of the receipts which have to be collected to meet the contributions to the sinking funds and interest thereon.

In my opinion that portion of the receipts would not be taken into account by the tenant in calculating the profit to be derived by him, especially in view of the restriction imposed on him by the fixing of the standard prices to be charged for the sale or supply of electricity which, by the Schedule to the Agreement of May 27, 1924, are to cover the amounts required for the sinking funds and interest, and it cannot be assumed that the tenant will pay a larger rent for the privilege of collecting money for the benefit of the landlord. It follows, therefore, in my opinion, that so much of the receipts as is collected to provide the sinking funds and interest will form no part of the profit accruing to the tenant and should be excluded in ascertaining the rent which the hypothetical tenant would pay. See the observation of Lord Dunedin in the opinion which he expressed in *Port of London Authority* v. *Orsett Union Assessment Committee* (1), where he said: "There are several ways of attacking the problem. One way is to consider what profit the hypothetical tenant could make out of the hereditament, not in order to rate that profit, but in order to find out what he was likely to give in order to have the opportunity of making that profit."

On behalf of the respondents it is contended that the landlord, being under statutory obligation to provide these sinking funds, would insist on a rent sufficient to cover the contributions to those funds, but for the purposes of rating a hereditament the hypothetical landlord is assumed to be willing to let to a tenant willing to take and not a person in a position to dictate his own terms. This is not a case like the London School Board or the London County Council and the sewers, where the owner is the only possible tenant, the appellants, in fact, having already leased a part of their undertaking at a yearly rent to the London Electricity Joint Committee, Ld., by the agreement of December 13, 1923, and is not therefore governed by the same considerations as applied to such cases.

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(1) [1920] A. C. 273, 295.

It is in my opinion an exceptional case, governed by the special legislation, and for these reasons I arrive at the conclusion that the appellants' contention is correct and that the gross and rateable values of the said hereditaments should be reduced to 72,664*l.* and 36,332*l.* respectively.

Macnaghten J. This is an appeal by way of special case stated for the opinion of the Court under s. 40 of the Valuation (Metropolis) Act, 1869. The appellants, the St. James' and Pall Mall Electric Light Company, Ld., are a company registered under the Companies Acts, 1862 to 1886, carrying on business for profit. The respondents are the Assessment Committee of the City of Westminster and the Surveyor of Taxes for the district comprising the parish of that city. By a Provisional Order made by the Board of Trade under the Electric Lighting Acts, 1882 and 1888, and duly confirmed by the Electric Lighting Confirmation (No. 9) Act, 1890 (53 & 54 Vict. c. cxciv.), the appellants are authorized to supply electrical energy throughout that part of the parish of the City of Westminster which formerly constituted the parish of St. James', Westminster.

For the purpose of their business the appellants own and occupy a number of hereditaments in that parish consisting of land, buildings, machinery, mains, services, supply wires and other appurtenances for the supply of electricity. The special case has been stated to obtain the opinion of the Court with regard to the valuation of those hereditaments for the purpose of rating. The parties are agreed that in order to arrive at the gross and rateable values of the hereditaments, as defined by the Valuation (Metropolis) Act, 1869, the method of valuation on what is called "the profits basis" must be adopted; that those values are to be ascertained by a calculation based on the earnings or revenue of the appellants' undertaking. There is no dispute about that. As was explained by Lord Cave in the *Kingston Union Assessment Committee* v. *Metropolitan Water Board* (1), in cases where the valuation is made on the "profits basis,"

(1) [1926] A. C. 331, 337, 339.

the rateable value of the hereditaments is ascertained, according to the usual practice of rating surveyors, by deducting from the gross receipts of the undertaking the working expenses, an allowance for tenant's profit, and the cost of repairs and other statutable deductions. The appellants contend that, in the circumstances of this case, sums which they are bound by law to set aside out of their revenue year by year in order to provide certain "sinking funds" ought also to be deducted. The respondents maintain that no such additional deduction should be made. That is the matter in dispute on which the opinion of the Court is sought.

The Assessment Committee rejected the contention put forward by the appellants, and they fixed the gross and rateable value of the hereditaments at 89,922*l.* and 44,961*l.* It is agreed that if the appellants' contention be correct these assessments should be reduced to 72,664*l.* and 36,332*l.* respectively.

The obligation to set aside part of their revenue annually in order to provide two funds, called "Sinking Fund A" and "Sinking Fund B" is imposed upon the appellants by the London Electricity (No. 2) Act, 1925 (15 & 16 Geo. 5, c. lxiii.). By that Act it is provided that on December 31, 1971, the undertaking of the appellants shall be transferred to the London and Home Counties Joint Electricity Authority—a body corporate duly constituted by the London and Home Counties Electricity District Order, 1925—on the terms contained in an agreement dated May 27, 1924, set out in the Third Schedule to the Act. Sect. 10 of the Act confirmed that agreement and provided that it should have effect as if it had been enacted therein.

The agreement provides that when the transfer of the undertaking takes place on December 31, 1971, no payment is to be made by the Joint Electricity Authority to the appellants for such of their "physical assets"—an expression which includes lands, buildings, works, machinery, plant, mains, apparatus, appliances and other like property—as the appellants had provided before July 31, 1925, but that year by year from 1925 to 1971 the appellants must set aside out of their revenue sums which will eventually provide a fund sufficient to meet the value of those physical assets at the date of the transfer, and that this fund, called "Sinking Fund A," shall then be retained by the appellants for their own use.

The agreement contained somewhat similar provisions with regard to such "physical assets" as might be provided by the appellants after July 31, 1925. To meet the value of those physical assets as at the date of the transfer of the undertaking to the Joint Electricity Authority, the appellants are required to set aside year by year out of their revenue sums to provide the fund called "Sinking Fund B." When the transfer of the undertaking takes place the Joint Electricity Authority will pay to the appellants the amount expended by them in providing those physical assets, less the amount then standing to the credit of the sinking fund B, and that fund will also then be retained by the appellants for their own use.

In these circumstances it cannot be said that the sums which the appellants are thus required to set aside year by year out of their revenue to provide these two sinking funds are in any sense of the word "profits." They are, in fact, sums which go to provide what is in substance, though not in form, the purchase money for the "physical assets" of the undertaking when it is acquired by the Joint Electricity Authority on December 31, 1971.

Whatever method of valuation be adopted, whether it be the "profits basis" or "the contractor's test" or the more usual method of considering competitive rents, the object of the valuation is always the same—namely, to ascertain the rent which the hypothetical tenant would be willing to give for the use and occupation of those hereditaments for a year. It would, to say the least, be odd if the adoption of the "profits basis" as the proper method of valuation in this case led to the result that sums provided for the purchase of the hereditaments must be regarded as, to some extent, the measure of the rent which the hypothetical tenant would pay for their use for a year. Whatever merits a method of valuation based on the purchase price of the hereditaments

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may possibly possess, such a method is plainly inconsistent and incompatible with a valuation based on annual profits. It is said that the contention put forward by the appellants is contrary to all precedent and authority. The cases, such as *Port of London Authority* v. *Orsett Union Assessment Committee* (1); *Metropolitan Water Board* v. *St. Marylebone Assessment Committee* (2); and *Kingston Union Assessment Committee* v. *Metropolitan Water Board* (3), show that where the valuation is made on the "profits basis," the fact that part of the revenue of the undertaking is by law appropriated to the creation of a sinking fund or to the amortisation of capital is immaterial and does not affect the valuation at all. But it is to be observed that in those cases the owners of the hereditaments received the benefit of the sums set apart or used for the amortisation of the capital; and when that is the case, such sums do in truth partake of the character of rent, and, if they partake of that character, they obviously ought to be included in the assessment of the annual value.

In this present case the appellants do not, either as the owners or as the occupiers of the hereditaments, get the benefit of the sums which they are bound to set aside out of their revenue for the sinking funds A and B. It is the Joint Electricity Authority who will get the benefit of those sums in reduction of the purchase money which would otherwise be payable by them to the appellants for the "physical assets" of the undertaking when it is transferred on December 31, 1971. It seems to me, therefore, that in the circumstances of this case the proper application of the "profits basis" method of valuation requires that these sums should be deducted from the revenue of the undertaking for the purpose of ascertaining the gross and rateable values of the hereditaments, and I think the appeal should be allowed.

Appeal allowed.

T. W. M.

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(1) [1920] A. C. 273.

(2) [1923] 1 K. B. 86.

(3) [1926] A. C. 331.

The Assessment Committee appealed. The appeal was heard on November 8, 9, 10, 11, 14 and 15, 1932.

Tyldesley Jones K.C. and *Harold Murphy* for the Assessment Committee. The proper way to assess the hereditaments forming part of this undertaking is on the profits basis: *Kingston Union Assessment Committee* v. *Metropolitan Water Board.* (1) The profits basis proceeds upon the principle of arriving at the rent the tenant would pay for the hereditament after taking into consideration what he would receive in the form of revenue, the amount of his outgoings, and the return he would require for his management of the concern; the balance so arrived at is what he would be willing to pay over to the landlord in the form of rent. The first item in the account is the total gross receipts which any one carrying on the undertaking would receive. On the other side it is contended that a portion of the gross receipts is received solely for the purpose of providing the sinking fund and that the gross receipts ought to be reduced by that amount, or that there ought to be a deduction from the gross receipts of the amount put to the sinking fund each year. That contention is a negation of elementary principles. In the gross receipts is included everything which the hypothetical tenant of the undertaking would receive, and from those gross receipts the working expenses, but not the rent, must be deducted in order to arrive at the net receipts. The tenant then takes what he requires for his remuneration and interest on his capital, and the balance of the net receipts is paid to the landlord as rent. "Gross value" in the Valuation (Metropolis) Act, 1869, which applies to the present case, is defined as "the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and taxes, ... and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in

(1) [1926] A. C. 331.

a state to command that rent." "Rateable value" means "the gross value after deducting therefrom the probable annual average cost of the repairs, insurance, and other expenses as aforesaid." The St. James' Co. is admittedly entitled to a deduction for a renewal fund to cover the renewal of the perishable parts of the undertaking, but is not entitled to the deduction claimed in respect of sinking funds A and B. By virtue of s. 8 of the Electric Lighting Act, 1882, local authorities authorized to supply electricity by any licence, Order, or special Act and who borrowed money on such security were required—by virtue of the Metropolis Management Act, 1855, or outside London by the Public Health Act, 1875—to provide a sinking fund by contributions out of revenue year by year, in order to repay the loans they had borrowed. Under s. 2 of the Electric Lighting Act, 1888, undertakers supplying electric light in any area were compelled to part with their undertaking if the local authority desired to purchase it at the appropriate time upon payment, not of their capital, but of "the then value of all lands, buildings, works, materials, and plant of such undertakers." The St. James' Co. Order imposed a limit on the price to be charged for the electricity but imposed no limit as to dividend, and provided for the purchase of the undertaking by the local authority in 1931. The effect of the London Electric Supply Acts of 1908 and 1910 was to make the London County Council and not the borough councils the purchasing authority for the whole of London of the various London electric light companies. By that time some of the companies had set up sinking funds for the redemption of debentures, but there was no statutory obligation to provide these sinking funds. The Electricity (Supply) Act, 1919, by s. 13 enabled the right of any local authority to purchase the undertaking of any authorized distributors to be transferred to and vested in the Joint Electricity Authority for the district. The Electricity (Supply) Act, 1922, by s. 1 enabled a Joint Electricity Authority to borrow money for the payment of the purchase price of any undertaking subject to the term of providing for the repayment thereof by a sinking fund. The Joint Electricity Authority was required by s. 18 to fix the prices charged for electricity supplied by the Authority so as "to cover their expenditure on income account (including interest and sinking fund charges)." Negotiations took place between the various London electric light companies and the London County Council with regard to the suspension of the powers of purchase vested in the London County Council, and ultimately in May, 1924, terms were arranged which are confirmed in and made binding on the parties by the London Electricity (No. 2) Act, 1925, the terms including the establishment of a Joint Electricity Authority for the county and adjacent areas, the regulation of companies' dividends by the prices charged for electricity, and the transfer to such Joint Electricity Authority of the powers of purchase of the Council, but that the exercise of the right of purchase should be postponed for forty years until 1971. The Scheme was that the companies might as from 1931 pay 7 per cent. on their ordinary capital, but that if they sold electricity below a certain standard price fixed in accordance with the Act they might pay an increased dividend. This was in accordance with an entirely new method of regulating dividends first adopted in connection with gas companies in 1920 and since applied to almost all gas companies. The companies' undertakings were to be transferred in 1971 without any payment except in respect of physical assets provided after the establishment of the Joint Electricity Authority in 1925. The companies were to be recouped by the Authority the moneys they had expended in providing such assets less the amount in sinking fund B. Sinking fund A was to be provided by setting aside annually such sum as would be sufficient to replace in 1971 the value of the physical assets of the companies in existence at the date of the establishment of the Joint Electricity Authority. The value of the physical assets was to be arrived at by taking their cost as appearing in the books of the company less a proper depreciation to date. Therefore sinking fund A was to provide for the capital the company had expended at the date of the establishment of the Joint Electricity Authority, and not merely the value of the physical assets. The standard prices to be charged for electricity were to be fixed so as to yield sufficient revenue to meet the companies' working expenses, interest on debts, loans, dividends on Preference capital, dividends at the standard rate on the ordinary capital and the companies' contributions to the two sinking funds A and B. There was also an important provision that if a company was under an obligation to provide a sinking fund for the redemption of loan capital and were required to set aside annual contributions therefor, the future contributions to such sinking fund should "be taken into account in calculating the annual sum to be set aside for sinking fund A." "Taken into account" must mean "go in reduction of." That is important, because the companies have never claimed that they were entitled to deduct their sinking funds provided under their debenture trust deeds from their gross receipts for the purposes of assessment. The obligation to provide sinking funds A and B is an obligation which does not pass to a hypothetical tenant; it remains with the landlord, as they were sinking funds required to provide for the landlord's capital, and the landlord would provide the sinking funds out of the rent which he would exact from his lessee. The question is, what would a tenant give as rent for the right to occupy these hereditaments? The landlord would require the tenant to pay a rent which would cover (inter alia) the sinking funds which he is bound to provide in order to replace the property which he would lose in 1971. The tenant would only agree to pay that rent if he could obtain a revenue sufficient to cover that rent after satisfying the tenant's working expenses and remuneration for carrying on the undertaking. Inasmuch as the Act of 1925 enables a charge to be made for the supply of electricity sufficient to provide a revenue to cover, in addition to the tenant's working expenses and remuneration, the amount of the sinking funds, the tenant would agree to pay the rent demanded. Each local authority or public board which is the owner of a statutory undertaking—such as the Metropolitan Water Board, the Port of London Authority, and the Joint Electricity Authorities—is under a similar obligation to set aside out of revenue a sum for a sinking fund, and it has never been suggested that these sinking fund contributions can be deducted from gross receipts for the purposes of assessment. The only payment that is made by a hypothetical tenant to the landlord is in the form of rent, and there is no such thing as collecting money from the consumers by the hypothetical tenant as a conduit pipe on behalf of the landlord. The question in this case is the same as that which would be raised in the case of a sinking fund to provide for the redemption of debentures. The obligation to provide a sinking fund is one imposed on the landlord and is his liability, not the tenant's. In the case of a statutory undertaking in assessing the value of the occupation of the hereditament a comparison with other premises is not available, it is therefore necessary to consider what rent a hypothetical tenant would pay for the particular hereditament in question, coupled with its statutory powers, including the power of charge and the statutory restrictions: see per Lord Buckmaster in *Poplar Assessment Committee* v. *Roberts*. (1) It has always been recognized that where an undertaker is under a statutory obligation to set aside a sinking fund that obligation continues even if he lets the hereditament to a tenant; in such a case the hypothetical tenant would have nothing to do with it, and in arriving at the rent which he would be willing to pay no deduction for the purposes of assessment can be made from the tenant's gross receipts in respect of the contributions to the sinking fund. In the *Kingston Union* case in the Court of Appeal Atkin L.J. said (2) that in estimating the profits for the purpose of seeing what rent a hypothetical tenant would pay "one must not take into account annual charges which would properly fall upon the hypothetical landlord. Interest and sinking fund charges therefore on the capital sunk either in constructing the hereditaments or in purchasing them must

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(1) [1922] 2 A. C. 93, 103.

(2) [1925] 2 K. B. 509, 565.

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not be taken into account." "Must not be taken into account" means "must not be deducted from the gross receipts." Lord Cave L.C. dealt with the profits basis in the *Kingston Union* case in the House of Lords. (1) He said: "From the gross receipts of the undertakers for the preceding year they [that is, rating surveyors] deducted working expenses, an allowance for tenant's profits, and the cost of repairs and other statutable deductions, and treated the balance remaining (which would presumably represent the rent which a tenant would be willing to pay for the undertaking) as the rateable value of the entire concern." A similar statement was made by Lord Dunedin in *Port of London Authority* v. *Orsett Union Assessment Committee.* (2) The question whether, in arriving at the rent which the hypothetical tenant would pay, the amount required to be set aside as a sinking fund might be deducted from the gross receipts, is one of law: see *Mersey Docks* v. *Liverpool,* per Blackburn J. (3) The cases establish that statutory restrictions on the power of charging must be regarded, because they affect the hypothetical tenant who can only receive such revenue as the statute allows to be raised, and the statutory restrictions affect the gross receipts he can receive: see *Worcester Corporation* v. *Droitwich Assessment Committee* (4); the *Orsett Union* case (5) and the *Kingston Union* case (6); but that any restrictions imposed by statute with regard to the application or disposal of net receipts must be disregarded, because they do not affect the hypothetical tenant: see *Mersey Docks and Harbour Board* v. *Cameron* (7); *Rex* v. *Woking Inhabitants* (8) and *Newport Union* v. *Green.* (9) The present undertaking has been provided by the expenditure of capital on the part of the St. James' Co., it is the St. James' Co. who will lose its property in 1971 and who will consequently want the sinking

(1) [1926] A. C. 331, 339.
(2) [1920] A. C. 273, 296.
(3) (1873) L. R. 9 Q. B. 84, 94.
(4) (1876) 2 Ex. D. 49.
(5) [1920] A. C. 273.
(6) [1926] A. C. 331.
(7) (1865) 11 H. L. C. 443.
(8) (1835) 4 A. & E. 40.
(9) [1907] 2 K. B. 460. In the H. L. sub nom. *Green* v. *Newport Union* [1909] A. C. 35.

fund, and it is the St. James' Co. which is under the statutory obligation to build up the sinking fund to replace the assets which it will lose in 1971. The hypothetical tenant will lose nothing in 1971; he does not require the sinking fund, as the capital is not his; he will pay nothing to the sinking fund; he will only pay to the landlord sums of money as rent and the landlord will build up the sinking fund. Gross receipts are what the hypothetical tenant will receive by virtue of his occupation: *Merthyr Tydfil Local Board of Health* v. *Merthyr Tydfil Union Assessment Committee.* (1) Whatever the hypothetical tenant receives by virtue of his occupation must be brought into the account as an item of gross receipts. Therefore the payments which the hypothetical tenant of an electrical undertaking would receive for the supply of electricity would be included in the gross receipts, and no deduction can be made therefrom for the purpose of providing a sinking fund. The basis of the decision in *Metropolitan Water Board* v. *St. Marylebone Assessment Committee* (2) was that the Metropolitan Water Board were under a statutory obligation to provide a sinking fund; that obligation was a landlord's obligation and did not pass to the hypothetical tenant; and that the amount of a deficiency rate which was raised in order to pay debt charges including contributions to the sinking fund could not be included in the gross revenue of the undertaking for the purposes of assessment, as the payments for which the precepts were required were of a kind made by the landlord and not by the tenant. That decision was followed in *Manchester Corporation* v. *Bolton Area Assessment Committee and Little Hulton U. D. C.* (3), where it was held that the proceeds of a public water rate could not be included in the gross revenue of the water undertaking in the valuation of the hereditament, as there would have been no need for the hypothetical tenant to raise the public water rate but for the fact that the landlord's charges were included in the account. There the public water rate had nothing to do

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(1) [1891] 1 Q. B. 186.
(2) [1923] 1 K. B. 86.
(3) (1931) 144 L. T. 570.

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with the supply of water; it was raised for the purpose of meeting debt charges payable by the corporation in respect of expenditure made upon works in course of construction and not yet occupied. In *Brecon Markets Co.* v. *St. Mary's, Brecon* (1), it was held that a company which had acquired markets formerly vested in a municipal corporation upon the terms that the company should pay annually 210*l.* to the corporation could not claim a deduction of that sum from the gross receipts of the tolls before arriving at the rateable value of the market. It was there contended that the tenant of the company was a mere conduit pipe by which the above sum was conveyed to the corporation, but it was held that all the tolls paid for the use of the market were vested in the company and no part was vested in the corporation. So in the present case all the receipts for the supply of electricity must go in the first instance into the pockets of the hypothetical tenant of the undertaking and form part of his gross receipts. A hypothetical tenant must be assumed to pay a rent for the occupation of the hereditament; he collects nothing on behalf of the landlord. Whatever the hypothetical tenant pays to the landlord he pays as rent; if he agreed to pay the contribution to the landlord's sinking fund it would still be rent. In *Reg.* v. *Rhymney Ry. Co.* (2) wharves owners let them to a railway company, but by the agreement certain wharfage dues were made payable to the owners and were not receivable by the railway company. It was held that the railway company, being the occupiers of the wharves, were rateable for their full value, including the wharfage dues. No deduction can be made from the gross receipts for payments which would fall on the hypothetical landlord and not on the hypothetical tenant, even though the liability to pay them is imposed by statute upon the statutory undertaker, for instance, interest on mortgages: *Rex* v. *Chaplin* (3); *Reg.* v. *Holme Reservoirs Directors* (4); *Mersey Docks* v. *Liverpool* (5); a rentcharge payable by a statutory undertaker: *Rex* v. *Woking Inhabitants* (1); contributions to a sinking fund: *Metropolitan Water Board* v. *St. Marylebone Assessment Committee* (2); *Kingston Union Assessment Committee* v. *Metropolitan Water Board*, per Atkin L.J. (3); and in the House of Lords per Lord Cave L.C. (4) The House of Lords in *Port of London Authority* v. *Orsett Union Assessment Committee* (5) held, in a case where the undertakings of certain dock companies had been transferred to a public authority, that in rating the hereditament the rating authority were not precluded from making an allowance for tenants' profits. Both Lord Birkenhead (6) and Lord Dunedin (7) there pointed out the distinction between restrictions upon profit-earning capacity and rules providing for the application of profit when earned. The former would affect the value of the hereditament, the latter would not. The hypothetical tenant must be taken as being subject to the statutory restrictions which affect the earning-capacity of the undertaking but not to be subject to the restrictions or limitations which deal with the disposal of the revenue of the undertaking. But in none of the speeches of the Law Lords is there any suggestion that a deduction can be made from gross receipts in respect of a sinking fund which has always been treated as a landlord's liability. Any annual contributions to a voluntary reserve fund which the St. James' Co. set up before the 1925 Scheme came into operation could not be deducted in arriving at the assessable value of the undertaking. If the undertaking had been let before 1925 the tenant would have paid a rent which would not be reduced by the amount of any sinking fund the company set up. If the tenant had continued his tenancy after 1925 he would receive the same revenue from the supply of electricity and would pay the same rent to the landlord, who would pay a smaller dividend to the shareholders and accumulate out of the rent the necessary sinking fund.

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(1) (1877) 36 L. T. 109.

(2) (1869) L. R. 4 Q. B. 276.

(3) (1831) 1 B. & Ad. 926.

(4) (1862) 10 W. R. 734.

(5) L. R. 9 Q. B. 84, 94.

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(1) 4 A. & E. 40.
(2) [1923] 1 K. B. 86.
(3) [1925] 2 K. B. 509, 565.
(4) [1926] A. C. 331, 341.
(5) [1920] A. C. 273.
(6) Ibid. 285.
(7) Ibid. 299.

A. T. Miller K.C. and *Colin H. Pearson* for the St. James' Co. The decision of the Divisional Court was right and in accord with the principles laid down by the Courts in relation to the proper method of rating. It is true that in certain cases sinking funds were said to be funds provided by the landlords and were considered to be an obligation discharged by the landlord out of the rent, but it does not follow that those cases bind this Court to come to the same conclusion with regard to the sinking funds in this case. This is an exceptional case and depends upon its own Scheme and the agreement which is embodied in this legislation. It is an essential feature of the statutory conditions under which the tenant is entitled to use the undertaking that he shall provide out of his gross revenue these sinking fund contributions, which serve no purpose whatever of his; in fact they provide part of the purchase money of the undertaking in 1971. A hypothetical tenant in considering what rent he will pay for the undertaking will consider what surplus there will be left after the necessary expenses of running the undertaking have been met; if he is bound by statute to find the money for the sinking funds that will reduce the available surplus to be divided between himself as profit and the landlord as rent. Sinking funds may be of three different kinds: (1.) a sinking fund provided by the landlord out of the rent, or by the tenant in such circumstances as to be an addition to the rent; (2.) a sinking fund provided by the tenant out of his own profit for his own purposes; (3.) a sinking fund which is a limitation of the benefit to be derived by the tenant from the occupation of the hereditament. The cases which have been cited are illustrations of sinking funds which come under classes 1 and 2. The sinking funds in the present case come under class 3. They are not a landlord's charge which can be regarded as deductible from the rent or contributed by the landlord, nor are they something which the tenant has to pay out of his profits; they are a charge upon the undertaking inherent in its nature by reason of the statutory limitations which have been imposed upon it, and something that must be deducted from the gross receipts before there can be a division between rent and tenant's profit. It does not matter whether these sums are excluded altogether from the gross receipts, or whether they are included in the gross receipts and then deducted in order to arrive at the available surplus for division between the landlord as rent and the tenant as profit. The cases dealing with a deficiency rate show that it is a fallacy to suppose that because a certain sum is a receipt of the undertaking, therefore it must be regarded as part of the gross receipts. The proper charges imposed upon the gross receipts must be deducted before one can ascertain what amount the tenant can pay as rent. Everything received by the tenant of the undertaking is paid by the consumer for the supply of electricity, but the amounts so paid include a sum which is necessarily collected by the tenant as part of his statutory obligation and is only held by him for the purpose of the sinking fund because that is charged upon the receipts, and such sum should be excluded from the gross receipts for the purposes of rating. In considering what rent a hypothetical tenant of an undertaking can pay account must be taken of the imposition upon the hereditament of any statutory restriction or limitation which necessarily affects the beneficial occupation of the tenant, either by imposing a limitation on that user or by imposing an obligation to do something which must necessarily be done by the occupier, as the hypothetical tenant is the person bound by that statutory obligation. It is true that that which is paid for the benefit of the owner of the hereditament is a landlord's payment, which he pays out of his rent, and is not a tenant's payment, and that if a sinking fund is provided to meet an obligation of the landlord such a sinking fund cannot be deducted from the gross receipts in ascertaining the rateable value of the hereditament. Lord Parker of Waddington in *Metropolitan Water Board* v. *Chertsey Union Assessment Committee* said (1): "The problem in all rating cases is to ascertain the rent which a tenant might be fairly expected to pay by the year for the privilege of occupying the hereditaments the subject of the assessment"; and he used a very similar expression in *Great Western and Metropolitan Ry. Cos.* v. *Kensington Assessment Committee.* (1) In applying the profits basis method of calculation rules of practice must not be employed rigidly in a case where they demonstrably give the wrong result. Only payments by a tenant as rent are relevant in making this calculation—namely, payments made for the privilege of occupying the hereditament. Payments made in circumstances which make it impossible to describe them as rent—such as the payments to these sinking funds—must be excluded, because they could not in any circumstances be considered as paid to the landlord as rent. They are not available to the landlord or to the tenant; they have to be accumulated till 1971. With the sinking funds in existence the tenant can only pay a smaller rent, as the available surplus will be less than it otherwise would be. The question is what is the hereditament worth to the tenant, and if he finds the gross receipts are reduced by any sort of rentcharge, he will deduct that charge before arriving at the rent he can pay. The question what deduction ought to be made or can reasonably and properly be made by a tenant from his gross receipts in applying the profits basis "is a question of common sense, and not a question of law": see *Cartwright* v. *Sculcoates Union.* (2) The common sense way of looking at these payments to the sinking funds is that they are not payments made by the tenant for the landlord, as he has no interest in them. The annual payments to the sinking funds constitute the purchase money which is being accumulated for the benefit of the public, or their representatives, the Joint Electricity Authority, to be applied in 1971 in part payment of the purchase money of the undertaking. That is a burden which the undertaking is carrying and which reduces during all the years preceding 1971 its rateable value. It is only by fulfilling the statutory obligation of making those annual payments that the tenant can receive the gross receipts. Vaughan Williams L.J., in considering in the *Merthyr Tydfil* case (1) whether certain money received by the appellants were properly included in the receipts for the purpose of calculation of rateable value, said (2): "The only essential is, the money so received should be money potentially available to the hypothetical tenant as an item of gross profits." These sinking fund payments were never in the hands of the hypothetical tenant as money potentially available as an item of gross profit. But even if they are regarded as part of the gross receipts of the hypothetical tenant he is bound by statute to hold them in his hands till 1971, when the accumulated fund will be available for the benefit of a third person, who will pay it to the landlord as part of the purchase price of the undertaking. The hypothetical tenant must be assumed to take the hereditament subject to the limitations and restrictions imposed on it by Parliament, including the obligation to set aside out of the revenue of the undertaking these sinking funds: *Liverpool Corporation* v. *Wavertree Overseers* (3), which was approved in *Worcester Corporation* v. *Droitwich Assessment Committee.* (4) Lord Buckmaster said in *Port of London Authority* v. *Orsett Union Assessment Committee* (5): "The actual hereditament of which the hypothetical tenant is to be determined must be the particular hereditament as it stands, with all its privileges, opportunities and disabilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament. The character and the extent of the various deductions from the gross revenue must be fixed in relation to the conditions." The Scheme must be looked at as a whole, and when it is so looked at it is clear that it does not take away the property of the St. James' Co. in 1971 and give it free to the Joint Electricity Authority. What was arranged was that the power of the London County Council to purchase the undertaking should be transferred to the Joint Electricity Authority and should

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(1) [1916] 1 A. C. 337, 359.

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(1) [1916] 1 A. C. 23, 46.

(2) [1900] A. C. 150, 153.

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(1) [1891] 1 Q. B. 186.
(2) Ibid. 192.
(3) (1875) 2 Ex. D. 55*n*.
(4) 2 Ex. D. 49.
(5) [1920] A. C. 273, 305.

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not be exercised until 1971, and that the price should be provided for in part by sinking funds and in part by cash. The word "transferred" is used in the Act as being synonymous with "purchased." The substance of the matter is that the consumers of electricity between the years 1925 and 1971 will pay part of the purchase price for the undertaking; it is a transfer of the property of a private company to a public body, the private company receiving a purchase price from the public body which has been accumulated out of the payments made by purchasers of electricity during the years which preceded the agreed date for the compulsory purchase. The sinking fund is provided every year out of the revenue of the tenant, who will receive no benefit from it. That incident must affect the mind of the tenant as to the rent he will pay. Before arriving at the balance of receipts over expenses that is available for division between the landlord as rent and the tenant as profit the sinking fund must be deducted, because it is imposed by statutory obligation and is a different class of sinking fund from those referred to in the cases where the sinking funds were imposed by contract.

[GREER L.J. What difference does it make if the tenant after receiving his profit, instead of paying the balance of the receipts to the landlord as rent, pays a portion of it to a sinking fund for the benefit of the landlord?]

The hypothetical tenant takes possession of the undertaking subject to all the statutory limitations and obligations to which it is subject, including the obligation to set aside these sinking funds, and for that reason the annual contributions to the sinking funds must be excluded from the gross revenue when considering what rent a hypothetical tenant could reasonably be expected to pay. The sinking fund is not the landlord's sinking fund nor a sinking fund to replace the landlord's capital; it is accumulated till 1971, and then the Joint Electricity Authority takes possession of the hereditament and the sinking fund comes to the landlord in exchange for the hereditament. It is quite true that if the payment which the tenant made was made on account of the landlord, that payment would be equivalent to an extra rent. But the sinking fund in the present case is of a different character; it is not a landlord's sinking fund to replace the wasting assets of the landlord, but is a charge imposed upon the hereditament by statute, and the hereditament has a less rateable value because of it; the charge enures to the benefit of the public, because the Joint Electricity Authority will take the undertaking in 1971 free from the charge; the hereditament will then have a higher rateable value.

[Slesser L.J. In the *Kingston Union* case (1) there was a statutory obligation to deduct an annual sum for the redemption of water stock, and it was held by the House of Lords that that sum was not deductible from the gross receipts of the Water Board in ascertaining the rateable value of their undertaking. What difference is there in principle whether the statutory obligation is one to set aside a sum of money to redeem borrowed money or one to accumulate a sinking fund to replace wasting assets?]

In the *Kingston Union* case (1) the obligation on the Water Board was to repay a debt, whereas in the present case there is no obligation at all on the St. James' Co. to replace any capital of its own; the only obligation is to accumulate a sinking fund, which obligation is placed on the tenant by the terms of the agreement and statute. The Scheme is in substance, although not in terms, to be regarded as a purchase of this undertaking in 1971 by the Joint Electricity Authority, and the sinking funds are accumulated for the benefit of that Authority. This is not a sinking fund to replace wasting assets, because the assets are there and are not wasting. A sinking fund for a truly wasting asset, such as a quarry or a mine, is not deductible, because it does not affect the occupational value in the intervening years before the asset has become exhausted. Lord Denman C.J. said in *Reg.* v. *Westbrook* (2): " It does not appear to us that the circumstance of a more or less rapid consumption can make any difference in the principle. The rate is always

(1) [1926] A. C. 331.

(2) (1847) 10 Q. B. 178, 203.

imposed with reference to the existing value; whether temporary or enduring is immaterial." See also *Rex* v. *Bedworth Inhabitants* (1) and *Farnham Flint, Gravel and Sand Co.* v. *Farnham Union.* (2) None of those considerations apply to this case. This hereditament has to be rated during the period 1925 to 1971, having regard to all the limitations and restrictions imposed by statute upon its profit-earning capacity during that period.

[Greer L.J. If the St. James' Co. had of their own accord, without any statutory obligation, set aside these sinking funds to replace their capital in 1971, the rateable value of the hereditaments would not be reduced by the contributions to those sinking funds. Can it make any difference to the rateable value of the same premises that the St. James' Co. have been ordered by statute to do that which a properly conducted company would have done voluntarily?]

It would not be the same premises, because inherent in the Scheme, which has the force of a statute, is the charging power and price limitation as well as the creation of the sinking fund. The Scheme must be looked at as a whole, and so looked at it creates a rateable hereditament which has these obligations and limitations. A person who, without any statutory obligation, voluntarily accumulates a fund for his own purpose is in an entirely different position from that in the present case. The statutory obligation to set aside the sinking fund imposes a charge upon the hereditament which affects the profit-earning capacity of the hereditament in whosesoever occupation it is, and consequently it is a charge which reduces the rateable value of the hereditament. The sinking fund is a charge upon the hereditament which in the end enures neither for the benefit of the hypothetical landlord nor for the benefit of the hypothetical tenant, but for the benefit of the community who in 1971 will pay a price for the undertaking which price will be reduced by the accumulations out of the moneys contributed by the consumers in the years between 1925 and 1971. The rule is that a statutory charge which reduces the value of the occupation of the tenant reduces the rateable value of the hereditament. To that rule there are two exceptions where the charges do not affect the value of the occupation: (1.) where they are of such a nature that they are in substance rent or an addition to rent; and (2.) where they ought to be regarded as an appropriation by the tenant of part of his profits. In *Poplar Assessment Committee* v. *Roberts* (1) the House of Lords held that the restrictions imposed upon a landlord by the Rent Restriction Acts did not reduce the value of the tenants' occupation, because it was not a limitation imposed on the tenant, and therefore would not reduce the rent of the hypothetical tenant. In ascertaining rent on the profits basis a statutory charge which must be provided by the hypothetical tenant out of the revenue must, however, be deducted, because it is a limitation imposed on the tenant. Lord Buckmaster, in *Port of London Authority* v. *Orsett Union Assessment Committee* (2), speaking of the difficulty of applying the ordinary test of the standard of value of property which would ordinarily never be let, said that the difficulties had been overcome "by the process of beginning with the gross receipts of the undertaking and then, after making all the necessary deductions, ascertaining a balance, part of which is attributable to tenants' profits and the rest is assumed to be rent." The cases quoted by the appellants have no application, because the facts were quite different. This is an exceptional case, as was held by the Divisional Court. The contention of Mr. Tyldesley Jones that all receipts which the hypothetical tenant would receive by virtue of his occupation must be included in the gross receipts is not accurate, because it has been held that where the hypothetical tenant has succeeded to the undertakers' right to levy a deficiency rate if he makes a loss in any year, the produce of such rate ought not to be included in the assessment, because it is not available as an item of gross profit. But in any event the contention would merely amount to this, that the deduction cannot be made at that stage of the calculation. It is immaterial when the deduction is made, so long as it is made. The second contention of Mr. Tyldesley Jones—namely, that no deduction can be made from gross receipts in respect of payments which would fall on the hypothetical landlord and not on the hypothetical tenant, even though there is a statutory obligation imposed on the undertakers to make the payments, is one to which one can assent, because payments made in those circumstances would in substance form part of the rent. But the cases in which that proposition has been applied are very different from the present case. In the *Brecon Markets* case (1); *Rex* v. *Chaplin* (2); the *Holme Reservoirs* case (3), and *Mersey Docks* v. *Liverpool* (4), the payments made were quite plainly additions to the rent. The payments to the sinking funds in the present case are not an application of profits when earned, nor additions to the rent; they are in fact a limitation of the profit-earning capacity of this hereditament existing until 1971 in order that the Scheme may then enure to the benefit of the consumers of electricity.

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(1) (1807) 8 East, 387.

(2) [1901] 1 K. B. 272.

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(1) [1922] 2 A. C. 93.

(2) [1920] A. C. 273, 301.

Tyldesley Jones K.C. in reply. The provisions in the Metropolis Water Act, 1902, imposing an obligation upon the Metropolitan Water Board to create a sinking fund, were referred to in the course of the argument in the *Kingston Union* case (5), and it was in connection with this discussion that Lord Cave L.C. said (6): "The Board does and must aim at earning a profit, for without a very large profit it could not provide for payment of the interest and sinking fund on its stock." The basis of the rating of every local authority which carries on an undertaking has been that the moneys collected for the purposes of a sinking fund go into the hands of the hypothetical tenant as part of his gross receipts and are paid over to the landlord as rent. It is the landlord who makes the appropriation to the sinking fund out of his rent. It has never yet been attempted by a local authority to claim a reduction of their

(1) 36 L. T. 109.
(2) 1 B. & Ad. 926.
(3) 10 W. R. 734.
(4) L. R. 9 Q. B. 84.
(5) [1926] A. C. 331.
(6) Ibid. 342.

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assessment by a deduction of the sinking fund. The contention of Mr. Wilfrid Greene before the Divisional Court was that the sums which the St. James' Co. were compelled to pay into the sinking funds must be excluded from the gross receipts of the undertaking, but the decision in the *Merthyr Tydfil* case (1) is conclusive against that contention. It is sought to distinguish the present case from the *Kingston Union* case (2) and the *Orsett Union* case (3), where it was held that the sinking funds in those cases were not deductible, by saying that the sinking funds in the present case are a different kind of sinking fund from those in those cases. The sinking funds in those cases were created to pay off the capital that the owners had borrowed to establish an undertaking, and that is exactly what has been done in the present case. The sinking funds in the present case have been established to meet the capital liability of the St. James' Co. It is suggested that the sinking funds in the present case are not provided for the benefit of the landlord or occupier, but for the benefit of the Joint Electricity Authority, by providing the purchase money for the undertaking. But the Joint Electricity Authority will not pay anything for the existing assets of the undertaking in 1971. The company will rely upon the sinking fund to replace their—that is, the landlord's—capital. If this had been done by an insurance and there was an obligation on the tenant to pay the premium, he would have paid the premium as part of his rent. The tenant will not contribute to the landlord's sinking fund, he has nothing to do with the sinking fund which the landlord provides out of his rent; neither does the tenant receive the interest on the sinking fund investments or pay the interest which has to be paid to the sinking fund.

Cur. adv. vult.

1932. Dec. 19. The following judgments were read :—

SCRUTTON L.J. This case has taken a long time to argue and many authorities have been cited, but the point admits of being shortly stated. Rateable value of a hereditament is fixed originally by the rent which a reasonable tenant would pay for the beneficial occupation of the hereditament. Is a statutory obligation on such a tenant or on the undertaker, the owner of the hereditament, to make annual payments to create a sinking fund to replace the undertaker's capital, or to repay borrowed money, a payment of rent or in the nature of rent which must be taken into account in fixing gross and rateable value ?

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(1) [1891] 1 Q. B. 186.
(2) [1926] A. C. 331.
(3) [1920] A. C. 273.

The decision affects all the Metropolitan Electric Companies, and indeed also the practice generally followed in rating undertakings, whether commercial or public, but is conveniently raised by the case of the St. James' Co., because all that company's property is in one parish, and the complications of an undertaking in several parishes are thereby avoided.

Before 1925 the London County Council had the right to purchase in 1931 the undertaking of the St. James' Co., on terms of paying the then value of the lands and works belonging to the company. Before 1910 there was no statutory requirement of a sinking fund to replace capital or to repay money borrowed, or restriction of dividends. In 1924 certain negotiations took place between the London Electric Lighting Companies and the London County Council as the then purchasing Authority, which resulted in an agreement dated May 27, 1924, given statutory authority by the London Electricity Act (No. 2), 1925, s. 10. Under this bargain : (1.) the companies were given forty years longer profitable existence before they were purchased—i.e., till 1971. (2.) Their undertaking was then to be handed over, without payment, to a Joint Electricity Authority to be created, but their capital both created before and after that creation was to be secured them by the establishment of two sinking funds A and B, relating respectively to capital created before and after the creation of the Joint Electricity Authority. (3.) Standard prices for electricity were fixed by the statute, and were to cover and provide for (inter alia) the sinking fund annual payments and the annual interest on that fund. The effect of this was that the consumers who, as represented by the Joint Electricity Authority, would in 1971 get the St. James' undertaking without then paying for it, would have paid for it in the years 1931–1971 out of the standard prices they paid in so far as they provided for sinking fund instalments. (4.) The Electricity Companies, some of which had been paying dividends of 17½ per cent., were in consideration of their extended life limited in dividends to 7 per cent., except that if they reduced prices they might increase dividends. The exact details are immaterial. The result was that the companies bought forty years' further existence on terms that their prices charged and their dividends were limited, and that by sinking funds created out of standard prices, besides replacing their capital, subscribed or borrowed, they relieved the purchasing body, or the consumers, of the liability to pay in 1971 for the transfer to them of the undertakings of the companies. In other words, the Electric Companies continued to hold their undertakings on the terms of complying with certain statutory provisions, including the obligation to create sinking funds by annual payments.

The only question for our decision stated in the special case is in para. 14: "The appellants' contention is that in arriving at the gross and rateable values of the said hereditaments the sums which the appellants are required to set aside and pay annually out of their revenue in order to provide the said sinking funds and interest thereon should be excluded from the receipts of the appellants or allowed as a deduction therefrom." Then para. 17: "The question for the opinion of the Court is whether the appellants' contention as above stated is correct in law."

The pecuniary result of the answer to this question is agreed. The Assessment Committee included the annual sinking fund payments in their assessment; the Divisional Court struck them out; the Assessment Committee appeal.

The discussion commences with the statutory definition of "gross value" applicable in London under the Valuation (Metropolis) Act, 1869, s. 4: "The term 'gross value' means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and taxes, and tithe commutation rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent: The term 'rateable value' means the gross value after deducting therefrom the probable annual average cost of the repairs, insurance, and other expenses as aforesaid."

One must begin by ascertaining "gross value" and find the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for a hereditament. It will be observed that the value is based on "rent," not directly on profits, whether tenant's or landlord's profits. "Rent" assumes a landlord, and one may reasonably assume that a landlord who loses the direct receipts from the undertaking will endeavour to obtain any payments he would otherwise have made out of the receipts and interest on his capital invested and the replacement of his wasting capital in the shape of "rent," the price the tenant pays for the occupation which allows him to secure reasonable receipts or tenant's profit. The only "profit" an owner may make out of his property, such as a sewer, may be that it enables him to fulfil a statutory duty; that will be its value to him, and determine the amount of "rent" which if he were a tenant, which he is not, and the property could be let, which it generally cannot, he would pay to secure the opportunity of carrying out his statutory duty.

The House of Lords, in *Port of London Authority* v. *Orsett Union Assessment Committee* (1), have stated three established propositions: "Firstly, the question of rateability does not depend on whether the occupier does, or can, make a profit by the use to which he puts the hereditament; it depends on whether the occupation is of value. Secondly, in considering what rent a tenant would pay, the rating authority must consider the owner who is in actual occupation, or indeed the only possible occupier, as a possible tenant." The third proposition is immaterial to this case: "Fourthly, in such cases, any restriction imposed by law on the profit-earning capacity of the undertaking must be considered, for the profits to be taken into account must be such as the tenant can earn under the only conditions in which he is allowed to earn profits at all."

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(1) [1920] A. C. 273, 284.

The difficulties of working out an intelligible system in the case where an owner is supposed to pay rent to himself for property which he cannot legally let, have led to a number of authorities on the supposed motives of a non-existent person who has been called for the last seventy years the "hypothetical tenant." I doubt whether the position of his necessary partner in fiction, the hypothetical landlord, has been sufficiently investigated. But the House of Lords, in *Poplar Assessment Committee* v. *Roberts* (1), have considered "whether the rent is hypothetical as well as the tenant," and have decided that the "rent" for rating purposes may be one that the landlord cannot legally exact and which if the tenant paid he could by law recover back, and may merely represent the value to the tenant of the hereditament.

The difficulties of hypothesis have led rating surveyors to invent a formula called "the profits basis," which Lord Cave in *Kingston Union Assessment Committee* v. *Metropolitan Water Board* (2) approves and defines thus: "From the gross receipts of the undertakers for the preceding year they deducted working expenses, an allowance for tenant's profit, and the cost of repairs and other statutable deductions, and treated the balance remaining (which would presumably represent the rent which a tenant would be willing to pay for the undertaking) as the rateable value of the entire concern"; and again (3): "For this purpose they are entitled, as the Courts have held, to regard the actual occupants—in this case the Metropolitan Water Board—as possible tenants, and to consider what rent those occupants might reasonably be expected to pay for the privilege of occupying the hereditaments, having regard to the profits to be derived from such occupation; but in so doing they must take the hypothetical tenants as they are, and with all the limitations and restrictions which are imposed upon them by law and which they could not 'reasonably be expected' to leave out of sight. If other tenants can be found who might be expected to give a higher rent, well and good; but it can hardly be doubted that the Board, with all its limitations, would pay a better rent for the hereditaments which it occupies than any other tenants who could conceivably be found, and the basis of assessment must, therefore, be the rent which rebus sic stantibus the Board could and would pay."

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(1) [1922] 2 A. C. 93.
(2) [1926] A. C. 331, 339.
(3) Ibid. 342.

Whatever may be the difficulties where there is a statutory undertaking in various parishes, where the undertaker provides services, not to make profits for himself but to fulfil a public duty in return for payment of the cost by consumers, the case of a commercial undertaking which provides services for payments authorized by statute in order to obtain dividends for its shareholders and replacement of capital expended seems more simple. The undertaking is authorized to occupy its property on certain statutory terms which it must comply with. It receives payment for commodities supplied at a price fixed by statute. That price is to cover sinking fund payments to secure the return of its capital expended in providing the services. It gets the privileges of its undertaking on certain statutory terms, and is allowed to obtain means of complying with those terms by charging statutory prices to the consumer. Assume now that it is to let its undertaking with its privileges to a tenant from year to year, though no tenant but itself can legally carry on the undertaking, how is the rent which such a tenant would pay to be fixed, the rent which is to determine the gross value on which the occupier will be rated? One supposes the hypothetical tenant to say: I can receive so much, the standard price; I shall have to pay to other people in order to provide the services, so much. If there is a balance in my favour, I shall want a reasonable sum as tenant's profit for my services and my capital expenditure, if any. The balance will be rent to go to my hypothetical landlord. What for? For payment for the privilege of using his undertaking to get myself a tenant's profit, but also to provide payments which he is bound to make by statute, but which he would make out of his receipts for electricity supplied, if he had not transferred the right to receive those payments to me. The hypothetical landlord would reasonably ask for these sums to be covered by his rent, or by payments in the nature of rent to relieve him from liability to others.

I have had great difficulty in understanding the grounds on which these payments are not to be treated as in the nature of rent. The sums to provide them are paid by the consumer to the undertaker; and are to be assumed to be paid to the hypothetical tenant. He has received them because he is the tenant of the undertaking and is supplying electricity. We are told that Mr. Wilfrid Greene K.C. for the St. James' Co. argued below that such sums never came into gross receipts. I cannot understand the basis for this contention. They are receipts which the undertaking or the tenant gets for supplying electricity. I understood Mr. Miller's argument for the St. James' Co. to us to be that statutory charges which reduced the value of the occupation also reduced the rateable value, unless they were payments in the nature of rent or were charged on the tenant's profits. For payments which had nothing to do with rent or tenant's profits the tenant was merely a conduit pipe, and they should be deducted from his rent. These sinking fund payments were merely the means of paying the price which the Joint Electricity Authority would before 1971 pay, so as to be able to receive in 1971 the undertaking free of cost. In my opinion this argument entirely overlooks the undertaker's or hypothetical landlord's side of the question. He is to be deprived of his property in 1971. He naturally will provide in some way for the return of his capital, subscribed or borrowed, and is required by agreement and/or statute to do it by creating a sinking fund, which is to come out of the standard prices which he receives, and the hypothetical tenant is supposed to receive, from the consumer for electricity supplied. If his undertaking is supposed to be handed over to a tenant, the hypothetical landlord can only provide for the return of his capital or repayment of borrowed capital by including in his "rent" sums sufficient to provide for such a return, and the tenant receives in his standard price the sums sufficient to enable him to pay the landlord's demands. The tenant's rent may include sums paid to the landlord direct, or sums paid for the benefit of the landlord in discharging his liabilities to other people, debenture holders or his shareholders.

I am much impressed by the uncontradicted fact that rating assessments have proceeded for many years on the basis that sinking fund payments to return capital to shareholders, whether voluntary or by agreement with debenture owners or other lenders, or by statutory obligation, have been treated as not to be deducted for rating purposes from the receipts of the hypothetical tenant from supply of the products of the undertaking. I have the same reluctance as Lord Cave felt in the *Kingston Union* case (1) to disturb a long established formula of rating. But I cannot find that its correctness has ever before this case been seriously challenged. In the *Kingston Union* case (2) it was shown to us that in the argument the question of sinking fund was raised. Sect. 18 of the Metropolis Water Act of 1902 established a sinking fund to repay money borrowed for the purchase of the water companies, all debenture stocks, and all borrowed capital. After this discussion Lord Cave said in his judgment (3): "The Board does and must aim at earning a profit, for without a very large profit it could not provide for payment of the interest and sinking fund on its stock." That is to say, the Board makes profits from the supply of water from which profits it makes its sinking fund payments. If it is deprived of the hereditament from which the profits arise, it must receive

(1) [1926] A. C. 331, 340.
(2) Ibid. 331.
(3) Ibid. 342.

as rent from the tenant who receives the profits enough of those profits to defray its sinking fund obligations. Such payment is in the nature of rent, the price which the tenant pays for the privilege of receiving the profits. In the same case in the Court below (1) Atkin L.J. had said that for estimating profits, interest and sinking fund charges on the capital sunk, either in constructing the hereditaments or in purchasing them, must not be taken into account (i.e., that the tenant could not reduce his receipts or hypothetical profits by deducting sinking fund charges), and that this was agreed. Indeed, I understood Mr. Miller to admit that if the sinking fund was to replace landlord's capital, whether borrowed or shareholders, it was to be treated as rent, but that in the present case it was really only purchase price and therefore deductible. I am unable to take this view, and think the Assessment Committee followed the correct procedure and their decision should be upheld.

It remains to consider why the Divisional Court came to a different conclusion. The key-note of the judgment of Avory J., in which the Lord Chief Justice concurred, is to be found in the passage of his judgment where he said (2): "In these circumstances, the question for determination on this special case is whether the portion of the appellants' revenues which is collected to finance the sinking funds should be taken into account in arriving at the gross and rateable values of the hereditaments in question; in other words, whether the hypothetical tenant from year to year, who can derive no benefit from these sinking funds, in calculating the profit to be derived by him as tenant would take into account that portion of the receipts which have to be collected to meet the contributions to the sinking funds and interest thereon." This seems to me to misunderstand the position. The gross value is to be fixed: (1.) by ascertaining the receipts which the tenant gets from the supply of electricity; (2.) by deducting the expenses sanctioned by the statute, which do not include landlord's expenses such as sinking fund or interest on landlord's capital; (3.) by ascertaining what would be a reasonable charge for tenant's remuneration for personal services and interest on his capital; (4.) a balance will then be left which, as the tenant has got his own reasonable profit, he can reasonably allow to go to his landlord to meet landlord's liabilities such as interest on his capital, borrowed or subscribed, and sinking fund to repay or replace it. It is more reasonable that the tenant should do this, as he has received in his standard price the money to provide the sinking fund charges. The tenant cannot keep this sum and not defray the sinking fund charges, and he pays it to the landlord, because the sinking fund charges are for the landlord's benefit, and the landlord would reasonably demand a rent which would cover, amongst other things, his sinking fund charges. If this is the correct view, what has the fact that the tenant would not "take into account" sinking fund charges in calculating his profits to do with the question of the reasonable rent to the landlord? It is just because the tenant would not take into account sinking fund charges in calculating his tenant's profit that the amount to pay those charges received by the tenant in the standard price would fall into the balance which represents the landlord's reasonable rent. The judgment continues: "In my opinion that portion of the receipts would not be taken into account by the tenant in calculating the profit to be derived by him, especially in view of the restriction imposed on him by the fixing of the standard prices to be charged for the sale or supply of electricity which, by the Schedule to the Agreement of May 27, 1924, are to cover the amounts required for the sinking funds and interest, and it cannot be assumed that the tenant will pay a larger rent for the privilege of collecting money for the benefit of the landlord." Again, I do not understand this. The tenant does not pay a larger rent for the privilege of collecting the landlord's money; he pays it because he has received landlord's money for sinking fund charges, and if he does not pay the sinking fund charges, must hand that proportion of the price over to the landlord as in the nature of rent. Lastly, I read: "It follows, therefore, in my opinion, that so much of the receipts as is collected to provide the sinking funds and interest will form no part of the profit accruing to the tenant and should be excluded in ascertaining the rent which the hypothetical tenant would pay." This passage seems to me to turn on an ambiguity in the word "profits." The sums included in the standard price to defray sinking fund charges are receipts of the tenant, and, in one sense, profits of the undertaking, but no one suggests they are profits accruing to the tenant. They must be passed on to the landlord for whose benefit they are included in the standard price as part of the rent for which he allows the tenant to carry on the undertaking. The tenant cannot deduct them from his receipts before ascertaining the balance, for the very sufficient reason that the Act of 1869 does not specify them as receipts which may be deducted; they are not tenant's working expenses.

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(1) [1925] 2 K. B. 509, 565, 566.

(2) Ante, p. 611.

Macnaghten J.'s reason is given in the following passage of his judgment (1): "It is said that the contention put forward by the appellants is contrary to all precedent and authority. The cases, such as *Port of London Authority* v. *Orsett Union Assessment Committee* (2); *Metropolitan Water Board* v. *St. Marylebone Assessment Committee* (3); and *Kingston Union Assessment Committee* v. *Metropolitan Water Board* (4), show that where the valuation is made on the 'profits basis,' the fact that part of the revenue of the undertaking is by law appropriated to the creation of a sinking fund or to the amortisation of capital is immaterial and does not affect the valuation at all. But it is to be observed that in those cases the owners of the hereditaments received the benefit of the sums set apart or used for the amortisation of the capital; and when that is the case, such sums do in truth partake of the character of rent, and, if they partake of that character, they obviously ought to be included in the assessment of the annual value. In this present case the appellants do not, either as the owners or as the occupiers

(1) Ante, p. 616.
(2) [1920] A. C. 273.
(3) [1923] 1 K. B. 86.
(4) [1926] A. C. 331.

of the hereditaments, get the benefit of the sums which they are bound to set aside out of their revenue for the sinking funds A and B." I am quite unable to understand this; the undertakers or the owners do get the benefit of the sinking funds in either repaying borrowed capital or replacing shareholders' capital. It is true that the Joint Electricity Authority does get the benefit of the sinking funds when the Authority in 1971 gets the undertaking free. That is because the consumers out of standard prices have before 1971 paid sums which are by statute to go to form the sinking funds which relieve the Authority from the necessity of replacing the undertakers' capital by payment of a price in 1971, but the owner undertaker or hypothetical landlord also gets the benefit of those payments when they are included in the balance coming to him in the nature of rent.

These considerations seem to me so clear that I am afraid I may have misunderstood the reasoning of the Divisional Court. But when I add to these considerations the further element that the view of the Divisional Court is contrary to a view of the application of sinking fund payments, which has, as I understand, never before been questioned since the position of the hypothetical tenant first began to be investigated, until the argument in this case, I am satisfied that the Divisional Court came to a wrong conclusion, and that the question in the special case must be answered in favour of the Assessment Committee and this appeal allowed with costs here and below.

Many authorities were cited to us and appear in the shorthand notes of the argument. I have considered them all. Many of them appear to support the view I have taken, and, in my opinion, none of them support the view of the Divisional Court, whose attention does not, as far as one can gather from the judgment, seem to have been called to those most fatal to their reasoning.

Greer L.J. On December 15, 1930, the Westminster Assessment Committee (hereinafter called "the Committee") heard an objection by the St. James' and Pall Mall Electric Co., Ld. (hereinafter called "the company"), to the valuation list in respect of hereditaments occupied by the company in the parish of the City of Westminster, which consisted of land, buildings, machinery, mains, services, supply wires and other appurtenances for the supply of electricity, of which the company were owners in occupation. The Committee decided that the gross and rateable values to be entered in the valuation list should be the respective sums of 89,922*l.* and 44,961*l.* After notice of appeal to Quarter Sessions a case was stated on behalf of the company and the Committee raising the question whether the company was right in contending that certain sinking funds and interest thereon should, in calculating the gross and rateable values, be excluded from the receipts of the company, or allowed as a deduction therefrom. It is agreed between the parties that if that contention is correct, the gross value ought to be reduced to 72,664*l.*, and the rateable value to 36,332*l.*, and if not correct the values fixed by the Committee are to stand.

The question raised by the special case having been argued before the Divisional Court, and that Court having decided that the contention of the company was right in law, the Committee have appealed against that decision.

To enable me to consider and decide whether in my opinion the Divisional Court came to a right conclusion, I think it is necessary to state shortly what were the relevant statutory rights and duties of the company at the material time. Immediately before the passing of the London Electricity (No. 2) Act, 1925, the business of the company was carried on for profit, with the rights and subject to the duties imposed upon them by various statutes relating to the supply of electricity by companies and local authorities. The company had a monopoly of the right to make and sell electricity within the parish of St. James. They had raised their capital in the usual way by the issue of shares, and in all probability also by debentures, but they held their undertaking subject to an option, at this time vested in the London County Council, by notice in writing to require the company to sell their undertaking in the year 1931 on the terms that they were to receive "the then value of all lands, buildings, works, materials, and plant" which belonged to them, and which were "suitable to and used by them for the purpose of their undertaking within" the parish.

Mr. Tyldesley Jones, in the course of his argument for the Committee, referred to the various statutes whereby this position had been brought about at the material date, that is to say, when the London Electricity (No. 2) Act, 1925 (hereinafter called "the 1925 Act"), was passed. It is unnecessary for me to refer specifically to the statutes which preceded the 1925 Act. It cannot be and was not disputed that the effect of these statutes, so far as they are relevant to the question involved in this appeal, is correctly stated in the immediately preceding paragraphs of this judgment. By the 1925 Act, which confirmed an agreement entered into by a company, then called the 1920 Company, on behalf of a number of Authorities including the company, and the County Council, the life of the company was prolonged to December 31, 1971, broadly speaking in consideration of their giving up their right to the payments they would have received if the County Council had exercised the rights of purchase in 1931 above mentioned. By the agreement so confirmed the company were put under an obligation to raise two sinking funds, A and B, which would have the effect of leaving them in 1971 with money which they could use for the benefit of their shareholders who were in that year to become shareholders of a company whose physical assets were to be taken away from them without compensation. A limit of 7 per cent. was imposed by the Act on the dividends that the company could pay, with the right to increase such dividends to a limited extent in the event of the company making reductions to the consumers below the standard prices fixed in accordance with the statute. The agreement and the Act confirming it substituted as the transferee of the company's assets in 1971 a body called the Joint Electricity Authority for London and the Home Counties for the County Council, this authority having come into existence under some recent statutes which it is unnecessary to particularize. I do not think it necessary that I should refer in any more detail to the terms of the statutory agreement except to those contained in clause 7 which expressly refer to the sinking funds, and I think it will be sufficient to quote the part of the section relating to the establishment of the sinking fund. Clause 7 (1.) reads as follows: "The Company and each company being a constituent member of the Company shall provide a sinking fund A by setting aside annually out of their revenue such sums as with interest thereon will be sufficient to liquidate within such period or periods as may be approved by the Commissioners and in any event by the thirty-first day of December one thousand nine hundred and seventy-one the value as shown in the schedule relating to such company provided for in Clause 8 hereof of any physical assets of such company which are or may become by the terms of Clause 6 hereof transferable by such company to the Joint Electricity Authority free of charge and to liquidate any other sums being at the date of the establishment of the Joint Electricity Authority capital properly expended by such company as shown by their books and records. In the event of any such asset being transferred by any company being such a constituent member as aforesaid to the Company the foregoing provisions of this clause shall as from the date of such transfer apply to the Company in respect of the asset so transferred in lieu of such constituent company." Then follows an important proviso: "Provided that if the Company or any such company are under an obligation to provide a sinking fund for the redemption of loan capital and are required to set aside annual contributions therefor the future contributions to such sinking fund shall be taken into account in calculating the annual sum to be set aside for sinking fund A." I do not quote that part of the section which refers to sinking fund B, because it is clear that if sinking fund A is proper

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to be excluded or deducted from revenue in the calculation of the rent that a tenant would be willing to pay for the hereditament, it would follow that the amounts paid annually into sinking fund B would also have to be excluded or deducted, and if it is not to be excluded or deducted in the one case it ought not to be excluded or deducted in the other.

It was rightly conceded in this case by both sides that the gross and nett annual value of the company's hereditament ought to be ascertained by calculation made upon what is called the "profits basis." This, I think, is the necessary result of the decision of the House of Lords in *Kingston Union Assessment Committee* v. *Metropolitan Water Board.* (1) The annual value whether gross or nett for rating purposes is, by statute, to be made upon an estimate of the nett annual value of the hereditament, that is to say, of the rent at which the same might reasonably be expected to let from year to year free of all usual tenant's rates and taxes, tithe commutation rentcharges, if any, and deducting therefrom the probable average annual cost of repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent. This estimate of value for rating purposes has to be made whether the hereditaments are hereditaments with which the statutes regulating rateability in London are concerned, or whether the hereditaments are outside London; but with regard to hereditaments outside London it is no longer necessary to insert in the valuation list what the gross value is before the statutable deductions are made. In London it is still necessary to insert the gross value as well as the nett rateable value, but this is immaterial for the present purpose, as both the gross value and the nett annual value have to be estimated on the same basis, whether the hereditaments are in London or elsewhere. As it has been frequently pointed out, this estimate is an extremely difficult estimate to make where the hereditaments are such as are occupied always by owners conducting their own business on their own premises, and are never let from year to year; but, though the estimate is a difficult one, it has got to be made, and amongst the methods that have been adopted for many years by rating surveyors and accepted by the Courts of law as reasonable methods for ascertaining rateable values, is the one known as the "profits basis." This is a somewhat unfortunate and misleading name because, of course, a normal estimate of profits would be made after deducting rent and anything in the nature of rent. The true basis for the estimate of the rent is the revenue of the undertaking. The problem is, after making all allowance for what a tenant would be fairly entitled to out of the revenue, to ascertain by deduction what would be left for a reasonably satisfied tenant to pay his landlord for the privilege of being allowed to occupy the hereditament and obtain an income out of which he could recoup himself for his tenant's expenses. It should be remembered that in these calculations, though they begin with figures which are questions of fact, namely, the revenue which the occupying owner in fact gets out of the use of the hereditament, what the assessment committee and the tribunal have to do is to find a measure of what it is reasonable to suppose an imaginary person, namely, a tenant from year to year, would be prepared to pay for the privilege of occupying the premises and obtaining the revenue. The landlord of such a tenant might be a freeholder with an absolute right to use the money he would receive from his tenant for any purpose for which he liked to use it, and with no special reason why he should save any portion of it, whether for a sinking fund or otherwise. In such a case it seems clear that the balance remaining to the hypothetical tenant after he had given himself his expenses and his profits, would be a fair and reasonable estimate of the rent he would be prepared to pay. But the lessor receiving the remuneration from the tenant from year to year might be a leaseholder whose lease would come to an end at an ascertained date, say twenty years ahead. That leaseholder would, if he were wise, set aside a portion of what he received from the tenant to replace what he would lose at the end of his lease by

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(1) [1926] A. C. 331.

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having to give up his property, but whether he did so or not would be of no importance whatever to the tenant; it could not influence him in saying what he could afford and would be prepared to give for the right to occupy the hereditament. Again, the lessor might be a public company which was under contractual, or it may be statutory, obligation to use part of its receipts to build up a fund to repay capital borrowed. This consideration would be no reason why the tenant should be unwilling to pay the same rent as he would pay to a freeholder who had no such obligation. The lessor might be a company in the situation in which the St. James' Co. is, that is to say, a company which is going to lose its physical assets and some of its capital in forty years' time, and is required by statute to create a sinking fund in order to put in the place of the assets it was going to lose a fund of money for the benefit of its creditors or shareholders. Again, this would not, in my judgment, be a reason which would operate on the mind of the tenant to reduce his rent beyond that which he would be willing to pay to a freeholder who was not subject to any such obligation. I think the tenant from year to year would be willing to pay exactly the same rent to the landlord whether he was in the one class or the other above mentioned; and if we treat, as I am inclined to think we ought, the statute as imposing on the occupier, whether he be tenant or owner, the duty of paying a portion of his receipts into a sinking fund for the benefit of the owner, this makes no difference, as it amounts to a statutory direction as to the way in which he is to pay for the benefit of the owner a portion of the sum he is able and, as a reasonable tenant, willing to pay for the privilege of occupying the hereditament and taking his expenses and profit out of the profits he makes by such occupation. It is really part of the sum which is the measure of his rent, though it has to be paid in a particular way. I do not think it makes any difference to this result that in estimating the standard rates which are chargeable the sinking fund is taken into account for the purpose of determining the rate. This is only saying that the occupying tenant is allowed by statute to make his charge sufficient to enable him to obtain a larger revenue for division between his legitimate profits and his landlord's rent.

For these reasons, quite apart from authority, I have come to the conclusion that the judgment of the Divisional Court is wrong.

I also agree with Mr. Tyldesley Jones' argument for the company that the point is covered by authority, as no relevant distinction can be drawn between the moneys paid into sinking funds in the present case and the moneys paid into sinking funds in the *Kingston Union* case (1), which are there held to be part of the profits available to the tenant out of which to pay his rent, or from the sinking fund in the case of *Port of London Authority* v. *Orsett Union Assessment Committee* (2), which was treated as profit available for rent. It seems to me in those cases the House of Lords accepted the argument for the Assessment Committee that a distinction should be made between the restrictions upon the earning of profits and a restriction on the application of profits when earned, and that the House of Lords thought that such matters as sinking funds for the replacement of borrowed capital were not sums that ought to be deducted from profits when ascertaining the rateable value, because they were not to be regarded as limiting the profit-earning capacity, but rather as rules providing for the application of the profit when earned, and therefore not deductible before the share of the profits reasonably attributable to rent is ascertained. I see no distinction in principle between the sinking fund to replace capital and a sinking fund required for the repayment of the owner's debt; neither kind of sinking fund is any concern of a tenant from year to year. This in a sense comes out of his profit just as rent comes out of his profit, but the obligation to pay it is not a restriction on his earning capacity but a restriction upon the application of the profits when earned. It is not to be allowed, according to the admission of Mr. Manisty, approved by Blackburn J. in *Mersey Docks* v.

(1) [1926] A. C. 331.

(2) [1920] A. C. 273.

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Liverpool (1), and is therefore not to be deducted from the profits before they are divided as between the tenant and the landlord. It is therefore part of the moneys available to the tenant for rent after his expenses, interest on capital, and tenant's profits have been calculated and deducted from revenue. I think the amount payable to the sinking fund does not differ in principle from the statutory obligation imposed on the Brecon Markets Company to pay to the Brecon Corporation 210*l.* a year charged on the tolls they received in the markets: *Brecon Markets Co.* v. *St. Mary's, Brecon.* (2) In giving judgment Lush J. said: "The whole of the tolls are vested in the appellants, and no part is specifically, as has been contended, vested in the corporation. There is an arrangement in the nature of rent between the appellants and the corporation, but, even although it is rightly called a first charge upon the appellants' receipts, it cannot come within the authorized deductions for the computation of the rateable value."

The strongest authority against the respondents' contentions in the present appeal is afforded by the decision of the House of Lords in *Poplar Assessment Committee* v. *Roberts.* (3) In that case it was held that in arriving at the valuation for the purposes of the Valuation (Metropolis) Act, 1869, of a hereditament to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied, the maximum gross value to be assigned to that hereditament was not limited to the standard rent. The majority of the members of the House who took part in the decision of this case accepted and applied the principles put forward in the argument of Mr. Talbot K.C. (now Talbot J.), which is stated succinctly in these words (4): "The rent therein mentioned" (that is, in s. 4 of the Valuation (Metropolis) Act, 1869) "is only a means of arriving at the value of the occupation of the hereditament to the occupier and the actual rent is relevant only in so far as it represents that value." In referring to the cases the successful argument continues as follows: "In all the cases cited by the respondent in the Courts below it was a restriction as to the use of the property or the value to be derived therefrom by the occupier which was relied on as affecting the rateable value of the occupation; but the restriction under the Rent Restrictions Act is not a restriction as to the use of the property, but a restriction as to the sum which the tenant can be compelled to pay for his occupation of it." As I read the speeches of Lord Buckmaster, Lord Atkinson and Lord Sumner, this argument was accepted as an accurate statement of the law. Lord Buckmaster says (1): "The tenant referred to is, by common consent, an imaginary person; the actual rent paid is no criterion, unless, indeed, it happens to be the rent that the imaginary tenant might reasonably be expected to pay in the circumstances mentioned in the section. But although the tenant is imaginary, the conditions in which his rent is to be determined cannot be imaginary. They are the actual conditions affecting the hereditament at the time when the valuation is made." And after referring to the decision of the House of Lords in *Port of London Authority* v. *Orsett Union Assessment Committee* (2), Lord Buckmaster says, near the bottom of the same page: "So far as the occupier is concerned, the provisions of the Rent Restriction Act have not in any way made his occupation less beneficial. It is the landlord who is affected, and he, as landlord, is not the subject of assessment, nor can his interest in the property be considered for the purpose of determining what that assessment should be. If, however, the rent which has to be ascertained under the section is the real rent, then the fact that that cannot be increased will have a material effect upon the valuation. I agree, however, with what was said by counsel for the appellants that so to interpret the statute would be to deal with something which was nothing but a measure of value in such a manner as completely to destroy the very object for which that measure was set up. Just as the tenant is hypothetical, so also is the rent; it is only used as a

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(1) L. R. 9 Q. B. 84, 94.

(2) 36 L. T. 109.

(3) [1922] 2 A. C. 93.

(4) Ibid. 95, 98.

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(1) [1922] 2 A. C. 103.

(2) [1920] A. C. 273.

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standard which must be examined without regard to the actual limitation of the rent paid by virtue of covenant as between landlord and tenant, and also, as I regard it, to statutory restrictions that may be imposed upon its receipt." Lord Atkinson, in referring to the definition of rateable value in the Acts of 1836 and 1869, says (1): "That is the measure, and the only measure of the rateable value which is provided." And later on the same page he says: "This imaginary rent is not to be confounded with the rent which an actual tenant in possession in fact pays."

Lord Sumner and Lord Parmoor agreed that the statutory limitation on the rent that the owner could demand was not a limitation which could be taken into account in making an estimate of the rental value for the purposes of rating. This is a very strong decision, and I think it necessarily carries with it the principle that in finding the measure of the rent payable by the hypothetical tenant on the "profits basis" the provisions of the statute relating to what has to be done with the sum available for rent so ascertained have not to be taken into account in ascertaining the figures which afford the statutory measure of the gross and rateable values. If a statute provided that part of the rent was to be paid to A and part to B, it is obvious that the whole of the estimated rent would have to be used for the purpose of ascertaining the gross and rateable values of the hereditament. So, also, if one can conceive the statute saying directly what is said indirectly in the Rent Restrictions Act, that the tenant himself could retain part of the rental value of the premises, this again would have no effect on the true measure of the gross and rateable values of the hereditament. It seems to me that even if the sinking funds A and B are to be deemed to be paid out of the moneys received by a tenant from year to year from the consumers, this fact does not bring them within the authorized deductions for the computation of the gross or nett annual value for rating purposes.

(1) [1922] 2 A. C. 107.

I agree that this appeal should be allowed with costs. The answer to the question put in para. 17 of the case should be that the company's contention set out in para. 14 of the case is not correct in law, and the quarter sessions should be directed to dismiss the appeal against the valuation list as settled by the Committee.

Slesser L.J. In this case the appellants, the Assessment Committee of the City of Westminster, contend that in arriving at the gross value of the hereditaments of the respondents, the St. James' and Pall Mall Electric Light Co., Ld., the sums which the respondents are required to set aside and pay annually out of their revenue in order to provide certain sinking funds and interest thereon should be included among the receipts of the respondents, or, alternatively, not allowed as a deduction therefrom.

It is common ground between the parties that the method of arriving at the gross value as defined by s. 4 of the Valuation (Metropolis) Act, 1869, is to be upon what is known as the "profits basis." Since the decision in the House of Lords in the case of the *Kingston Union Assessment Committee* v. *Metropolitan Water Board* (1) there can be no doubt that this is a proper basis to employ; that is to say, that the rateable value of the hereditaments may in appropriate cases be ascertained upon a calculation based upon the profits earned by the undertaking in the preceding year. Lord Cave, in that case, said (2): "The precise date at which the profits basis was first devised and the name of its first inventor do not clearly appear; but it is plain from the reported cases that its adoption was immediate and enduring."

The principal contention in the *Kingston Union* case (1) was whether such a method was appropriate to a public body occupying hereditaments for the purpose of carrying out their statutory duties and not for the purpose of earning profits. The rejection of the profits basis did not find favour with the majority of the Court of Appeal nor with the House of Lords. In the Court of Appeal (3) Atkin L.J., in a

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(1) [1926] A. C. 331.

(2) Ibid. 339.

(3) [1925] 2 K. B. 509, 565.

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dissenting judgment, had referred to what is called "the contractors basis," and he points out as one of the grounds for his preference for that method that if the profits basis be employed "In estimating the profits for this purpose it is agreed that one must not take into account annual charges which would properly fall upon the hypothetical landlord. Interest and sinking fund charges therefore on the capital sunk either in constructing the hereditaments or in purchasing them must not be taken into account." That is to say, they must not be deducted in arriving at that annual profit of the hypothetical tenant from which, in its turn, would properly be deducted working expenses, statutory deductions for repairs, etc., the tenant's share, and so forth. In other words, Atkin L.J. is saying that the sinking fund charges must not be deducted from the receipts from which the permitted deductions are made.

In the House of Lords, Lord Cave L.C., in dealing with the argument that the profits basis is applicable only to companies carrying on business for profit, said (1): "To this argument one answer is that the statement as applied to the Metropolitan Water Board is inaccurate. The Board does and must aim at earning a profit, for without a very large profit it could not provide for payment of the interest and sinking fund on its stock."

This obligation to provide sinking funds was imposed upon the Metropolitan Water Board by statute, s. 18 of the Metropolis Water Act, 1902. It is not necessary to enter into the details of the obligation. It is sufficient to say that the purpose of the sinking funds was to make provision for the discharge of water stock, mortgage debts and sums borrowed by the Water Board under the statute.

Although the question of the deduction of the sinking funds from the gross receipts was not a direct issue in the *Kingston Union* case (2), yet it appears clearly to have been considered. Mr. Tyldesley Jones favoured us with a report of the actual argument in that case which does not appear in the Law Reports. From that report it is plain that

(1) [1926] A. C. 342.

(2) Ibid. 331.

Mr. Mitchell-Innes, in arguing the impropriety of the profits basis to a company which did not directly make profits, quoted s. 18 of the Metropolis Water Act, 1922, and said—denying that they made profit: "I should refer to a commercial profit as a profit which the person who is operating proposes to put into his own pocket." Lord Buckmaster said: "That is the application of the profit; that is not the making of the profit. Its destination cannot possibly affect it. That is the way in which it is going to be used, which is a totally different proposition."

It is thus clear to my mind that the House of Lords, agreeing with Atkin L.J., regarded the moneys required by statute to be placed in the sinking funds of the Metropolitan Water Board as coming into their hands, or into the hands of a hypothetical tenant using their undertaking, as profit. Their ultimate destination in that sinking fund was powerless to prevent them being profit in the first place. In so deciding they were but following the principle enunciated by Lord Birkenhead in the *Port of London Authority* v. *Orsett Union Assessment Committee* (1) where, in criticism of Lord Blackburn in the *Mersey Docks* case (2), he had said: "He" (Lord Blackburn) "omitted to observe the distinction between restrictions upon profit-earning capacity and rules providing for the application of profit when earned."

As Mr. Tyldesley Jones stated in the course of the argument: "The hypothetical tenant has nothing to do with the sinking fund. Whether he will pay a rent sufficient to meet the landlord's demands, including the sinking fund, depends entirely on this, whether he can get enough revenue to cover his working expenses, his tenant's share, and leave enough to meet the landlord's requirements." I do not think it necessary, after so clear a statement in the House of Lords, to consider the general principle that moneys paid to meet sinking funds, debentures, mortgages, and the like, are to be regarded as paid out of profit and not to be regarded as deductible from the profit which the hypothetical tenant will receive before he pays his rent. In other words, the

(1) [1920] A. C. 273, 285.

(2) L. R. 9 Q. B. 84.

hypothetical tenant (who may be himself a statutory occupier) must be regarded as being under an obligation to pay by way of additional rent so much as is incident to that occupation, including the duty to pay the necessary sums for sinking fund.

If further authority were wanted for this proposition I would mention the *St. Marylebone* case (1), in which it was held that interest on sinking fund has nothing to do with the hypothetical tenant, and a number of cases which show that the restrictions as to the application of net revenue are to be disregarded, such as *Mersey Docks and Harbour Board* v. *Cameron* (2); *The King* v. *Woking Inhabitants* (3); and the *Manchester Corporation* case. (4) Perhaps one of the clearest authorities which established that the first matter to be considered is what the occupier gets in the form of revenue by virtue of his occupation is the *Merthyr Tydfil* case (5), where Vaughan Williams J. said: "The only essential is, the money so received should be money potentially available to the hypothetical tenant as an item of gross profits . . . . when once money has been received or is receivable by the hypothetical tenant as such tenant, it must be included in the receipts for the purpose of the calculation of his anticipated profits, even though the profits when earned may be appropriated in the hands of the tenant to the liquidation of debts which are not his as hypothetical tenant . . . . yet the money must have been received by the tenant under conditions that make it potentially available to him as an item of gross profit." See also the *Brecon Markets* case (6), where Lush J. said: "All the tolls paid for the use of the market are to go first into the hands of the appellants. . . . . There is an arrangement in the nature of rent between the appellants and the corporation, but even although it is rightly called a first charge upon the appellants' receipts, it cannot come within the authorized deductions for the computation of the

(1) [1923] 1 K. B. 86.
(2) 11 H. L. C. 443.
(3) 4 A. & E. 40.
(4) 144 L. T. 570.
(5) [1891] 1 Q. B. 186, 192.
(6) 36 L. T. 109, 111.

rateable value," and the *Poplar Assessment Committee* v. *Roberts* (1), per Lord Buckmaster: "the standard in the Act is nothing but a means of finding out what the value of that occupation is for the purposes of assessment. In my opinion, the rent that the tenant might reasonably be expected to pay is the rent which, apart from all conditions affecting or limiting its receipt in the hands of the landlord, would be regarded as a reasonable rent for the tenant who occupied under the conditions which the statute of 1869 imposes."

I agree with my Lord in the present case when he says: "I have had great difficulty in understanding the grounds on which these payments" (the payments to the sinking fund) "are not to be treated as in the nature of rent." I share his inability to understand the basis for the contention that such sums should be assumed never to have come into gross receipts. That is speaking generally; and I therefore propose next to ask whether there be anything in the peculiar statutory obligations in this case which would operate to exclude the general principle which has been applied to so many undertakings with obligations to pay money out of their receipts. In the language of Lord Parmoor in the *Poplar* case (2): "In ascertaining this annual value, all that can reasonably influence the judgment of an intending occupier ought to be taken into consideration, including not only the natural conditions, but any statutory provisions which may tend either to enhance or diminish the value of the beneficial occupation of the property or its profit-earning capacity." In all this there is no room for a consideration as to the destination of the profits—as into a sinking fund.

The general principle being so well established, I proceed, therefore, to consider the peculiar obligations in the present case to see if there be any justification for the deduction of the sums necessary to pay sinking fund before the gross receipts are ascertained. The material facts are as follows: A series of Acts of Parliament, beginning with the Electric Lighting Act, 1888, s. 2 (repealing s. 27 of the Electric Lighting Act, 1882), gave power to local authorities to purchase, after due notice, normally at the expiration of forty-two years, the undertakings of electric lighting companies in London "upon terms of paying the then value of all lands, buildings, works, materials, and plant of such undertakers." It will be noted that the compensation was limited to the matters above stated, though the Board of Trade had power to vary the terms of sale: s. 3. This power of the local authorities to purchase was transferred to the London County Council by the London Electric Supply Act, 1908, which Act applied to nine companies, which did not include the respondent company. Sect. 23 of the Act of 1908 gave to the London County Council power to give not less than three years' notice to purchase undertakings compulsorily in the year 1931 or at the expiration of any subsequent period of ten years. This Act was applied to the respondent company on the same terms by the London Electric Supply Act, 1910. The purchase price under these Acts of 1908 and 1910 would have been computed upon the terms specified in s. 2 of the Electric Lighting Act, 1888 (see s. 23, sub-s. 3, of the 1908 Act), and would therefore have been limited to the then value of the lands, buildings, etc., as already stated.

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(1) [1922] 2 A. C. 93, 104.

(2) Ibid. 120.

Such was the position in which the companies found themselves in 1925, that they were liable to dissolution in 1931 with the limited compensation stated in the 1888 Act. The London companies, in this situation, came together and promoted a joint concern subsequently known as the London Electricity Joint Committee (1920) Ld. It is now known as the London Power Company, and that company, on behalf of itself and its constituents (which included the respondent company), sought to come to an agreement with the London County Council. In the result, there was passed the London Electricity (No. 2) Act, 1925. It is recited in the preamble to that Act that the London County Council desired that a Joint Electricity Authority should be established for the County and adjacent areas, the regulation of companies' dividends by the prices charged for electricity and the transfer to such Joint Electricity Authority of the powers of purchase of the Council with modifications and other matters. The agreement of May 27, 1924, as finally formulated was incorporated in the London Electricity (No. 2) Act, 1925, and it is that Act, which contains, among other things, the obligation to set aside sinking funds, which has raised the present difficulties.

That statutory agreement provided for many other matters, but the first to be considered here is that there was to be transferred to a Joint Electricity Authority, named in the Act, but not yet actually in being, the physical assets as there defined of the undertaking as formed part of the undertaking and were in use or available at the date of the establishment of the electricity authority to the future Joint Electricity Authority free of charge, and as to such physical assets as were provided after that date, they were to be paid for by the Joint Electricity Authority by a sum equal to the amount expended in providing such assets, less the amount standing to the credit of a sinking fund to be created called sinking fund B.

The Joint Electricity Authority was in fact established in 1925, and this date distinguished the obligation under the two sinking funds A and B which I have next to consider.

As to sinking fund A. It was required by the agreement that the respondent company should set aside annually out of their revenue such sums as, with interest thereon, would be sufficient to liquidate the value of any physical assets which became transferable to the Joint Electricity Authority free of charge. And to liquidate any other sums being at the date of the establishment of the Joint Electricity Authority capital properly expended by such company, provided that if the company were under an obligation to provide a sinking fund for the repayment of loan capital and set aside annually contributions therefor, the future contributions to that fund might be deducted in calculating the annual sum to be set aside for sinking fund A.

As to sinking fund B, this was to be provided by setting aside sums sufficient, with interest, to liquidate, within such periods as may be approved by the Electricity Commissioners, the cost of assets provided by the company after the establishment of the Joint Electricity Authority. The result of all these provisions is, in my opinion, that the respondent company must be regarded as possessed of wasting assets which will be finally exhausted in 1971, apart from the particular matters which are to be paid for or deductible from sinking funds or purchased. The whole capital value of the undertaking will be transferred to the Authority in 1971 free of charge. Save as expressly provided the respondent company will get no compensation. An attempt was made on the appeal to enlist the natural hesitation of the Court to conclude that any undertaking will be transferred to some other person without compensation, and an argument was adduced to the effect that what was actually contemplated was a sort of a purchase (to use Lord Halsbury's well-known phrase) by the Authority in 1971. This argument appears to have found favour with Macnaghten J. in the Divisional Court and, indeed, seems to have been the basis of the distinction which he thought he found between this case and the *Kingston Union* case (1), but in my opinion in truth there is, save where expressly provided in matters not covered by the sinking fund, no purchase by the Authority at all.

The consideration which moved the respondent company was the extension of their rights to continue the undertaking until 1971, instead of having to endure its possible compulsory purchase in 1931 on a very limited basis of compensation. Whether such an agreement was wise or unwise is not in any case the concern of the Court. The parties entered into it, and Parliament approved it. And it is impossible in my view to say, when an Authority receive property declared by statute to be free of charge, that it can be said to purchase it, without an abuse of language. In my view it would be far more accurate to regard the obligation to supply these sinking funds as a form of compulsory insurance. So regarded, it is clear that they are

(1) [1926] A. C. 331.

paid out of receipts. They are one of the burdens which the hypothetical tenant takes upon him as the price of occupying the hereditaments in just the same way as the tenant in the *Kingston Union* case (1) took upon him the obligation to discharge the various liabilities imposed upon the Metropolitan Water Board under s. 18 of the Metropolis Water Act, 1902.

There is perhaps this distinction, that in that case it appeared that the whole of the profits would be absorbed normally in satisfying the obligations, whereas in the present case the agreement recognizes that the charges to be imposed will be sufficient, primarily, to meet the expenses of the sinking funds.

I come to this conclusion for the following reasons: One of the requirements of the agreement was that the dividend should be limited to 7 per cent. upon a basis of a certain standard of prices. These standard prices are said to be such that, when applied to the units sold in the last completed year, they will provide sufficient revenue to meet various costs and charges, one of which is (Schedule, paras. 9 and 10) for sinking fund and for interest thereon. The respondent company had formerly been unlimited in the dividends which they might declare, but by s. 10 of the No. 2 Act, 1925, the agreement set out in the Third Schedule was confirmed and made binding on the London Electricity Joint Committee (1920) Ld. and the respondent company and on the future Joint Electricity Authority. And by para. 2 of the agreement thereunder it is provided that the dividends of the respondent company and other companies shall be regulated by the price of electricity sold by the company in accordance with the sliding scale of prices and dividends set out in the Schedule.

Turning to the Schedule, para. 4, it is provided that after 1931 the standard rate of dividends on the ordinary capital shall be 7 per cent., and there is machinery—which I need not discuss—for increasing or reducing the prices charged with a consequent effect on the dividend if the price be

(1) [1926] A. C. 331.

reduced. There are many other provisions of a highly technical nature, but the result is that, on a standard price which is computed on the basis of including the cost of setting aside the sinking fund, a dividend of 7 per cent. may be declared. The tenant therefore may be assumed to be given power by the statute to charge up to the amount of the standard price with a limitation of a 7 per cent. dividend, and such standard price will include the sum which he will receive in revenue, taking into account the obligation to pay the sinking fund liability over to the hypothetical landlord as part of his rent. In the *Kingston Union* case Lord Cave L.C. said (1) the assessing authorities "must take the hypothetical tenants as they are, and with all the limitations and restrictions which are imposed upon them by law and which they could not 'reasonably be expected' to leave out of sight."

The limitation in the present case is a limitation of price, and that price includes the sum to be charged to pay the sinking fund, and a limitation of 7 per cent. dividend on that standard charge. The limitation of right to charge is truly a limitation which, as Lord Cave says, "must be imposed upon the hypothetical tenant." This is in accordance with all authority. But I do not read Lord Cave as saying that the obligation to pay the sinking fund is an obligation to be imposed upon the tenant himself to pay the sinking fund otherwise than by paying additional rent. To do so would be to commit the error against which we were warned by Lord Birkenhead in the *Orsett Union* case (2) of failing "to observe the distinction between restrictions upon profit-earning capacity and rules providing for the application of profit when earned."

Finally, therefore, I am of opinion that the tenant will pay a rent, subject to the authorized and agreed deductions, based upon the profits received. That such profits must be taken to be whatever the undertaking brings in by reason of its operations having regard to the limitation of price charged to the consumer fixed by the statutory agreement;

(1) [1926] A. C. 342.

(2) [1920] A. C. 273, 285.

that he must be assumed to pay in rent in addition to other rental, sufficient rental to enable the landlord out of the rental to pay the statutory sinking funds and that he will therefore by the permission which he obtains in place of the landlord be enabled to charge a price sufficient to meet these funds. The privilege of so charging and the liability to hand over the revenue derived from so charging will cancel out and he will be left after undisputed deductions to get the dividends of approximately 7 per cent. contemplated by the statute.

This case, therefore, is, in a sense, more easily determined in favour of the appellants than was the *Kingston Union* case (1), where, apparently, the whole revenue was absorbed by the obligation to meet the charges under s. 18 of the Metropolis Water Act, 1902, though had there been no provision here fixing the maximum price of dividend in relation to the amount required for the sinking funds, I should still have come to the opinion that the case was covered by the authority of the *Kingston Union* case. (1)

In my opinion the special circumstances in this case have fortified the conclusion at which I should have arrived in any event that this appeal must be allowed. The question asked by the respondent company in the special case stated—namely, whether, in arriving at the gross and rateable values of the said hereditaments, the sums which the respondent company are required to set aside and pay annually out of their revenue in order to provide the said sinking funds and interest thereon should be excluded from the receipts of the respondent company or allowed as a deduction therefrom, should be answered in the negative.

Appeal allowed.

Solicitors for the appellants, the Assessment Committee of the City of Westminster: *Allen & Son.*

Solicitors for the respondents, the St. James' and Pall Mall Electric Light Co.: *Sydney Morse & Co.*

R. F. S.

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(1) [1926] A. C. 331.

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In re BARNES CORPORATION.

Ex parte HUTTER.

Municipal Corporation—Election of Aldermen—First Meeting—Chairman other than those Named in Charter of Incorporation—Whole Voting Paper not openly Read by Chairman—Irregularity—Remedy—Mandamus—Municipal Corporations Act, 1882 (45 *&* 46 *Vict. c.* 50), *s.* 60; *s.* 87, *sub-s.* 1 (*d*).

At the first meeting of the council of a borough for the election of aldermen, the chairman, acting in pursuance of an arrangement to that effect previously made by the councillors, read aloud from the voting papers to the meeting only the surnames of the persons voted for, and did not read therefrom the other matters therein contained in accordance with s. 60, sub-s. 4, of the Municipal Corporations Act, 1882, namely, the Christian names, places of abode and descriptions of these persons, and the names of the persons by whom the voting papers were signed, and as the result of the voting certain councillors were declared to have been elected aldermen and acted as such:—

Held, that the chairman did not "openly . . . . read" the voting papers within the meaning of sub-s. 5 of that section and that, instead of the open election provided for by the Act, there had been a ballot or secret election which was not in accordance with the law.

Held, further, that, as there had been no lawful election and the offices of aldermen were unfilled, the proper remedy was not a quo warranto, or an election petition under s. 87 of the Act, but a mandamus under s. 225 to hold an election of aldermen, and that the writ should be peremptory, notwithstanding any inconvenience that might be caused by the displacement of persons who were then acting as aldermen.

Reg. v. *Chester Corporation* (1855) 25 L. J. (Q. B.) 61, and *Woodward* v. *Sarsons* (1875) L. R. 10 C. P. 733 applied.

The charter of incorporation of a municipal borough, which was granted in accordance with the Municipal Corporations Act, 1882, provided that a named person, or in case of his death, inability, refusal or default a second named person, or in case of his death, inability, refusal or default a third named person, should perform the duties of chairman of the first meeting of the borough council for the election of aldermen. The first named of these persons having already been elected mayor, and he and the second named of them being candidates for the office of alderman, and the third named of them not being present, a councillor who was not one of these three persons was elected chairman of that meeting and acted as such without protest at the time by any of the three named persons:—

Held, that, in the circumstances, the councillor who had been elected chairman was entitled to act as such although he was not one of the three named persons.

THE Municipal borough of Barnes was incorporated by a Royal Charter dated August 29, 1932.

The charter, which recited that it was granted in accordance with the Municipal Corporations Act, 1882, provided (cl. 2) that the inhabitants of the district comprised within the limits therein set forth and their successors should be one body politic and corporate by the name of "The Mayor, Aldermen and Burgesses of the Borough of Barnes"; (cl. 3) that the mayor, aldermen and burgesses of the borough should have the powers, authorities, immunities and privileges usually vested by law in the mayor, aldermen and burgesses of a municipal borough, and the provisions of the Municipal Corporations Acts should extend to the borough and the inhabitants thereof incorporated by the charter; (cl. 4) that the number of councillors of the borough should be twenty-four; (cl. 7) that for the purpose of making the Act of 1882 applicable in the case of the first constitution of the borough, and of bringing into full existence and activity the corporation of the borough, and completely carrying into effect the incorporation by the charter intended, and for all the necessary purposes for which provision might lawfully be made, it was thereby, so far only as regarded the register of the local government electors for the borough, and the first election of mayor, aldermen and councillors, and the first appointment of town clerk for the borough, and matters connected therewith, Fixed and Ordered, Directed and Declared as follows: (iii) that both in relation to the matters aforesaid and also to any such election as aforesaid which it might be necessary to hold before an election could be held wholly in accordance with the Act of 1882, Mr. William T. Goodale, or in case of his death, inability, refusal or default another person therein named should be for all purposes whatsoever town clerk of the borough until a town clerk had been duly appointed in accordance with the Act of 1882, and Mr. J. D. Firmston, or in case of his death, inability, refusal or default Mr. William Hutter, or in case of his death, inability, refusal or default Mr. E. A. Medus, should perform the duties of mayor and aldermen respectively as returning officer and of the mayor as summoner of the first meeting of the council, and of the mayor or chairman of the meeting for the election of the mayor and aldermen, and the appointment of the town clerk and treasurer, and all the said persons should be substituted in the Act of 1882 for the town clerk, mayor, aldermen and chairman respectively, so far as relates to the matters aforesaid, and the said persons should have the like powers and perform the like duties and be subject to the like obligations and penalties in all respects as the officers or persons, whose duties they had under the directions aforesaid to perform, by law respectively had to perform and were subject to; (iv) that the first meeting of the council should be held on November 9, 1932; (v) that the first councillors of the borough should be elected on November 1, 1932, and the first mayor and aldermen on November 9, 1932; and (vii) that subject to the provisions and directions of the charter the provisions of the Act of 1882 (so far as unrepealed) and the Acts amending the same and the existing law relating to the registration of local government electors, and to electors and elections in municipal boroughs should apply to the Register of Electors, 1932, so far as related to the local government electors for the borough, and the nominations, elections and continuance in office of the first mayor, aldermen and councillors and the appointment and continuance in office of the first town clerk and treasurer, the first meeting of the town council, and all matters and things touching and concerning the above.

On November 1, 1932, twenty-four persons, including Mr. Firmston, Mr. Hutter, and a Mr. H. Hedderly, were elected councillors of the borough.

On November 4, 1932, pursuant to letters of invitation sent by Mr. W. T. Goodale, the charter town clerk, a meeting was held, the applicant and twenty-two other councillors being present, at which an agreement was come to that at the forthcoming election of aldermen the signatures on the voting papers should not be read out by the chairman. Before the date next mentioned a voting paper for the election of aldermen was sent to each of the councillors.

On November 9, 1932, the first meeting of the council took place, at which, after the election of mayor, the election of aldermen was held, and as the mayor, Mr. Firmston, and Mr. Hutter were candidates for the office of alderman, and Mr. Medus was not present, Councillor H. Hedderly was elected to act and acted as chairman during the election of aldermen. The chairman on receipt of the voting papers read from each paper the surnames of the persons for whom votes had been given, but did not read or cause to be read the Christian names, places of abode, or descriptions of these persons, or the signatures of the persons signing the voting papers, and, after reading a part of the voting paper as aforesaid, he declared that eight persons, whose names he stated, were elected, the first of these persons being Mr. Firmston, the mayor.

The applicant gave notice, dated November 28, 1932, of an application under the Municipal Corporations Act, 1882, s. 225, for a writ of mandamus to be directed to the mayor, aldermen and burgesses of the borough requiring them to hold an election of aldermen, on the ground that the election of aldermen purporting to have been held on November 9, 1932, was not held in accordance with the provisions of s. 60 (1) of that Act, and was not an election within the meaning thereof or of the charter, and that accordingly

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(1) The Municipal Corporations Act, 1882, provides :—

Sect. 60 : "(1.) The ordinary day of election of aldermen shall be the 9th of November, and the election shall be held at the quarterly meeting of the council.

"(2.) The election shall be held immediately after the election of the mayor, or, if there is a sheriff, the appointment of the sheriff."

"(4.) Every person entitled to vote may vote for any number of persons not exceeding the number of vacancies, by signing and personally delivering at the meeting to the chairman a voting paper containing the surnames and other names and places of abode and descriptions of the persons for whom he votes.

"(5.) The chairman, as soon as all the voting papers have been delivered to him, shall openly produce and read them, or cause them to be read, and then deliver them to the town clerk to be kept for twelve months.

"(6.) In case of equality of votes the chairman, although as an [outgoing] alderman or otherwise not entitled to vote in the first instance, shall have the casting vote.

"(7.) The persons, not exceeding the number of vacancies, who have the greatest number of votes, shall be declared by the chairman to be, and thereupon shall be, elected."

[The word "outgoing" in s. 60, sub-s. 6, of the Act of 1882 was repealed by the Municipal Corporations Amendment Act, 1910 (10 Edw. 7 and 1 Geo. 5, c. 19), s. 1.]

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BARNES CORPORATION, *In re.* HUTTER, *Ex parte.*

without that writ no election of aldermen could now be held.

In support of the application the applicant made an affidavit in which he stated that at the meeting on November 4, he, being doubtful of the legality of the suggestion that the signatures of the voting papers should not be read out by the chairman, took no part in the discussion of that matter and in no way assented to the suggestion; that after the election had been carried out he protested that it was illegal; and that subsequently he obtained the advice of the town clerk of a neighbouring borough that at an election of aldermen the names of the persons voting must be read out, and that he thereupon informed the charter town clerk of Barnes that he had obtained that advice.

In opposition an affidavit was made by Councillor Hedderly in which he stated that the applicant was present at the meeting on November 4, when it was agreed that the signatures on the voting papers should not be read out, and the applicant raised no objection; that at the meeting on November 9 he (deponent) as chairman read aloud to the meeting the surnames, and read to himself the remainder of the names, places of abode, and descriptions of the persons nominated as aldermen and the signatures of the persons voting, to satisfy himself that every paper was in order; and that at no time during the meeting before the adjournment to luncheon was any objection raised by the applicant or by any other councillor to the reading out of the surnames only of the persons for whom votes were given, and no request was made by the applicant or by any other councillor that the Christian names, addresses and descriptions of these persons, or the names of the councillors voting for them, should be read out; that after the election of aldermen had been completed he (deponent) vacated the chair, which was taken by the mayor, and the council dealt with other matters before it adjourned; and that it was only after the council resumed that the applicant for the first time made his protest.

Twenty-one other councillors made a joint affidavit confirming the statements made in the affidavit of Councillor Hedderly, and adding that in the event of a fresh election of aldermen being ordered, they would again nominate the same persons as aldermen and the result of the election would be the same as before.

S. G. Turner K.C. and *Maurice Fitzgerald* for the applicant. The rule should be made absolute for a mandamus to the corporation of the borough to hold an election of aldermen, on the ground that the election purporting to have been held on November 9, 1932, was not conducted in accordance with the Municipal Corporations Act, 1882, and the charter, but was illegal and no election at all.

First, that election was not an election within the meaning of the Act, because at the election meeting the chairman did not comply with the requirements of the Act in regard to the reading of the voting papers. Sect. 60, sub-s. 5, provides that the chairman, on the voting papers being delivered to him, shall "openly . . . . read them." These words mean that the chairman shall read the voting papers aloud to the meeting in order that all the particulars of the voting may be known to the electors. They would not be apt words by which to indicate that the chairman might read the voting papers quietly to himself. Further, the words mean that the chairman shall openly read the whole of each voting paper and not only a part of it. In the present case the chairman openly read from the voting papers only the surnames of the persons voted for, and did not openly read the other names and the places of abode and descriptions of those persons, or the signatures of the persons voting. He did not openly read the voting papers in compliance with the Act. The election was not an open election under the Act, but a secret or ballot election held without legal sanction and therefore void : see *In re Wilton Municipal Election.* (1) Secondly, the election was not an election within the meaning of the Act and the charter, because

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(1) (1886) 2 Times L. R. 283.

Councillor Hedderly, who took the chair at the meeting for the election of aldermen, was not one of the three persons named in the borough charter to perform the duties of chairman at that meeting and substituted by s. 212, sub-s. 2, of the Act for any person who might otherwise have been chairman under the Acts; and the voting papers when handed to him were not therefore delivered to or produced and read by the "chairman" in accordance with the provisions of s. 60. Councillor Hedderly was wrong in saying in his affidavit that he could be elected to act as chairman as he was not a candidate, because he was as much a candidate as any other qualified person: *Rex* v. *Bankes* (1); *Fordham* v. *Webber.* (2) There having been no election, the remedy is a mandamus to hold an election: see *Woodward* v. *Sarsons.* (3)

R. M. Montgomery K.C. and *A. M. Trustram Eve* showed cause. The application should be dismissed. The election of aldermen did not in any respect fail to comply with the requirements of the law.

The election was not prevented from being an election of aldermen within the meaning of the Municipal Corporations Act, 1882, because Councillor Hedderly acted as chairman of the meeting at which it took place. In the case of each of the three persons named in the charter to act as chairman of that meeting there was either inability, refusal or default. As regards Mr. Firmston the mayor there was inability. That term must be taken to include legal disqualification, which clearly existed in his case, because, being a candidate for the office of alderman, he was disqualified from acting as chairman or returning officer at an election of aldermen: *Reg.* v. *Morton* (4); *Reg.* v. *Owens* (5); *Reg.* v. *Tewkesbury Corporation* (6); and *Fanagan* v. *Kernan.* (7)

[LORD HEWART C.J. Ought not the word "inability" in the charter to be read as ejusdem generis with death, refusal or default?]

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(1) (1764) 3 Burr. 1452.

(2) [1925] 2 K. B. 740.

(3) L. R. 10 C. P. 733.

(4) [1892] 1 Q. B. 39.

(5) (1859) 2 E. & E. 86.

(6) (1868) L. R. 3 Q. B. 629.

(7) (1881) 8 L. R. Ir. 44.

As regards both Mr. Firmston and the applicant there was default, since, although they were both present at the election meeting, neither of them claimed the office of chairman or protested against Councillor Hedderly's appointment to it. As regards Mr. Medus there was inability, as he was not a member of the council and did not attend the election meeting. Where the person first entitled to act in an office is not available the Act makes provision for a substitute. The Second Schedule, cl. 9, provides that at every meeting of the council, if both the mayor and deputy mayor are absent, then such alderman, or in the absence of all the aldermen, such councillor, as the members of the council then present choose, shall be chairman. Under that clause Councillor Hedderly was in the circumstances properly chosen as chairman, notwithstanding that he was not one of the persons named as such in the charter. Having been elected chairman of the meeting he was entitled to act as such. Sect. 13, which fixes a term of office for councillors, s. 34, which provides that a qualified person elected to an office shall accept it, and s. 36, which provides that a person elected to an office who resigns it shall pay a fine, all show that in the view of the Act a person elected to an office should not immediately vacate it. Sect. 14, sub-s. 4, provides that if a councillor is elected to and accepts the office of alderman he vacates his office of councillor; and under that provision a councillor who was elected an alderman at a de facto election would be deemed to fill the office of alderman although his election was void in law.

[He was stopped on the question whether Councillor Hedderly was entitled to act as chairman of the meeting.]

The election in question was not prevented from being a valid election under the Act by reason of the fact that the chairman did not read aloud to the election meeting the whole of each voting paper. Sect. 60, sub-s. 5, in providing that the chairman of the meeting shall " openly produce and read " the voting papers only means that he must produce and read them in presence of the meeting and not secretly. The word " openly " has the same meaning in regard to both producing and reading. It does not imply that the whole contents of the papers must be read aloud to the meeting. Only so much of them need be read out as suffices to show who the persons voted for are.

If, as the applicant alleges, the election was not lawfully conducted, the remedy is not a mandamus to hold an election: *Reg.* v. *Chester Corporation* (1) and *Reg.* v. *Welchpool Corporation.* (2) Mandamus is only granted where an election duly held is found to be void, as, for example, because no valid nomination has been received, or because a candidate has died between nomination and poll: see Arnold on Municipal Corporations, 6th ed., p. 57. As there has here been a de facto election of aldermen, certain persons who were councillors are now acting as aldermen, and other persons have since been elected to take their places as councillors. A mandamus to hold an election of aldermen would not remove these persons from their present offices and might give rise to great difficulty, inasmuch as it would not appear whether the original councillors or the new councillors should vote at the election directed to be held. The question here being whether the persons elected to the offices are entitled to hold them, the appropriate remedy would be quo warranto: *Reg.* v. *Chester Corporation* (1); *Reg.* v. *Welchpool Corporation* (2); and *Rex* v. *Beer.* (3) Alternatively, the remedy would be an election petition under s. 87, sub-s. 1 (*c*) or (*d*); sub-s. 2: *Reg.* v. *Morton* (4); *Pritchard* v. *Bangor Corporation.* (5)

Turner K.C. in reply. Councillor Hedderly was not entitled to act as chairman of the meeting for the election of aldermen. Until the corporation of the borough had been brought into existence there were certain matters in respect of which the Act of 1882 could not apply, and where the charter made provision for these matters it took the place of and excluded the provisions of the Act. Thus, as there could not as yet have been a mayor elected under the Act to assume the office of chairman at the first meeting for the

(1) 25 L. J. (Q. B.) 61.

(2) (1876) 35 L. T. 594.

(3) [1903] 2 K. B. 693.

(4) [1892] 1 Q. B. 39.

(5) (1888) 13 App. Cas. 241.

election of the mayor and aldermen, and as the charter specifically provided that one of three named persons—namely, Mr. Firmston, Mr. Hutter or Mr. Medus, should perform the duties of chairman at that meeting, it is clear that only one of these three persons and no one else could legally be chairman at that meeting, and that if any one else assumed to act as chairman thereat the meeting would not be well constituted. Before a mayor has been elected under the Act, the expression "the mayor" as used in various provisions of the Act can only refer to the mayor named in the charter. In these circumstances that must be the meaning of the expression in s. 53, sub-s. 1, which provides that at an election of councillors for a borough the returning officer shall be the mayor; in s. 67, sub-s. 1, which provides for the case in which the mayor is dead or absent or otherwise incapable of acting in the execution of his powers and duties as to elections under the Act; and in Second Schedule, cl. 9, which provides: "At every meeting of the council, the mayor, if present, shall be chairman. If the mayor is absent . . . . then such alderman, or in the absence of all the aldermen, such councillor, as the members of the council then present choose, shall be chairman." In that provision the word "present" means physically present and nothing more, and therefore Mr. Firmston, the first named charter mayor, being present at the meeting, should have been chairman. Only in the absence from the meeting of all the three persons named as mayor in the charter did the right of the council arise under that provision to choose another person as chairman. None of the three named persons was disqualified from acting as chairman of the meeting for the election of the mayor and aldermen. Neither Mr. Firmston nor Mr. Hutter was disqualified. The fact that each of them was a candidate for the office of alderman was not inconsistent with his having been nominated as mayor in the charter: *Reg.* v. *White* (1); and that being so it could not have disqualified him as mayor for merely presiding as chairman at the meeting of councillors for the

(1) (1867) L. R. 2 Q. B. 557.

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BARNES CORPORATION, *In re.*
HUTTER, *Ex parte.*

election of a mayor and aldermen. They were both councillors, and no councillor could have been heard to say that he was not a candidate for the office of alderman. If, for example, electors at the meeting had voted for Councillor Hedderly and he had received a majority of votes, the fact that he was chairman would not have entitled him to refuse the office of alderman. If Mr. Firmston or Mr. Hutter was disqualified from being chairman at the meeting and nevertheless acted as such, the result would apparently have been that if electors had voted for him knowing of his disqualification their votes would have been thrown away, but if they had voted for him without knowing of his disqualification the election would have been void: *Reg.* v. *Tewkesbury Corporation.* (1) As to Mr. Medus, he was not a candidate for the office of alderman and he was not therefore disqualified as being a candidate or on any other ground, and he should have been sent for to take the chair. Only in the event of all these three persons being dead or incapacitated would it have become necessary to find some other chairman for the meeting. As Councillor Hedderly was not properly in the chair at the meeting the voting papers handed to him were not delivered to the chairman under s. 60 of the Act.

The election of aldermen having been no election in law and the offices of alderman being unfilled in law, the proper remedy is a mandamus to the council under s. 225 of the Act to hold an election of aldermen. The proper remedy here is not a quo warranto, which is only applicable where there has been an election of a person to an office and the office is filled, but it is alleged that the person filling it is disqualified or disentitled: *Rex* v. *Beer* (2) and *Reg.* v. *Chester Corporation.* (3) Neither is the remedy here by an election petition under s. 87, sub-s. 1 (*d*), of the Act, for that can only be resorted to where there has been an election and a question is raised whether a candidate who has been returned was duly elected by a majority of lawful votes. The grant of a mandamus to hold an election of aldermen would not cause any appreciable inconvenience. The effect of the writ would be that it would be made plain that the eight councillors who were supposed to have been elected aldermen were still councillors, and that any persons supposed to have been elected councillors in their places were not entitled to act as such; that at the election of aldermen directed to be held the same councillors would vote who had previously voted, the supposed new councillors having no status; and that where any councillors on election as aldermen vacated office as councillors under s. 14, sub-s. 4, of the Act, others would have to be elected in their stead. Before any election could be held due notice would have to be given of it under the Act to all parties concerned. None of the supposed aldermen would be liable to fines under s. 34 or s. 36, as these sections only apply to persons properly elected to official positions.

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(1) L. R. 3 Q. B. 629.
(2) [1903] 2 K. B. 693.
(3) 25 L. J. (Q. B.) 61.

LORD HEWART C.J. This is a motion for a writ of mandamus to be directed to the corporation of the borough of Barnes requiring them to hold an election of aldermen, on the ground that the election purporting to have been held on November 9, 1932, was not held in accordance with the provisions of the Muncipal Corporations Act, 1882, s. 60, and was not an election within the meaning of that Act. The case is of no little importance, and in the course of the argument many authorities have very properly been called to our attention; but in the view which I have formed it is not necessary that I should refer again to the considerable mass of these authorities.

In the case of *Reg.* v. *Chester Corporation* (1) Coleridge J. said: " A mandamus will only go upon the supposition that there is nobody holding the office in question, and it is an inflexible rule of corporation law that where an officer has been de facto elected, and has accepted office and acted, this constitutes a case of plenarty, unless the election be merely colourable. In such a case his title to the office is not to be tried by a mandamus. What then is the meaning of the election being colourable ? I take it that when parties have the right to elect and proceed bona fide upon the ground of there being a case for an election, it never can be colourable " (1)—thus stating in effect that, where a de facto election has been merely colourable, a mandamus ought to be granted to hold an election in accordance with the law.

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(1) 25 L. J. (Q. B.) 61.

The Municipal Corporations Act, 1882, s. 60, which provides for the election of aldermen, provides by sub-s. 4 : " Every person entitled to vote may vote . . . . by signing and personally delivering at the meeting to the chairman a voting paper containing the surnames and other names and places of abode and descriptions of the persons for whom he votes " ; and by sub-s. 5 : " The chairman, as soon as all the voting papers have been delivered to him, shall openly produce and read them, or cause them to be read, ..." Here the facts are substantially not in dispute. At a meeting of councillors held on November 4, 1932, an agreement was arrived at that at the forthcoming election of aldermen the signatures of the persons signing the voting papers should not be read out by the chairman. While the statute provides clearly for an open election, it was agreed at that meeting to substitute for an open election, an election which was not open. It is common ground that at the election meeting on November 9, 1932, the chairman, on the voting papers being delivered to him, only read out from them the surnames of the persons voted for, and these persons were then said to have been elected. He did not " openly . . . . read " the rest of the names and the descriptions of these persons, or the signatures of the persons signing the voting papers. In pursuance of the agreement previously arrived at the election was conducted in such a way as to be as secret as possible. In my opinion it was not an election within the meaning of the charter and the statute. In the case of *Woodward* v. *Sarsons* (2) Lord Coleridge C.J., in considering whether the election there in question had been conducted under the subsisting election laws, said : " It is

(1) 25 L. J. (Q. B.) 63.

(2) L. R. 10 C. P. 733.

not enough to say that great mistakes were made in carrying out the election under those laws: it is necessary to be able to say that, either wilfully or erroneously, the election was not carried out under those laws, but under some other method. For instance, if, during the time of the old laws, with the consent of a whole constituency, a candidate had been selected by tossing up a coin, or by the result of a horse-race, it might well have been said that the electors had exercised their free will, but it should have been held that they had exercised it under a law of their own invention, and not under the existing election laws, which prescribed an election by voting." (1) Applying these words mutatis mutandis to the admitted facts of the present case one may say that those who had to elect exercised their power of electing not under s. 60 but under a law of their own invention, and, therefore, as was said by Coleridge J. in the *Chester* case (2), that the election was merely colourable, or, as counsel for the applicant has preferred to put it, that there was not an election at all.

It is said by counsel for the respondents that, even if that be so, the case is not one for a mandamus, but for an election petition, and he relies upon s. 87 of the Act as supporting that view. It seems to me, however, that no part of that section is applicable to this case. The question here is not whether certain persons were duly elected by a majority of lawful votes, but whether the whole scheme of the election was not contrary to the charter and to the statute.

We have listened to a careful argument on the question whether Mr. Hedderly was properly in the chair at the meeting in question, he not being one of the three persons named in the charter to fill that position. I am disposed to think that on that point the contention of counsel for the respondents may be right, but that view would not alter the effect of a ruling on the main question that this election was in law no election at all.

Whatever inconvenience might be caused by the decision, and clearly some inconvenience would result from it, I am of opinion that there should be a rule absolute for a mandamus.

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(1) L. R. 10 C. P. 744.

(2) 25 L. J. (Q. B.) 61, 63.

AVORY J. I am of the same opinion. The application is based on two grounds. The first is that at the meeting of the council on November 9, 1932, for the election of aldermen, there was no chairman within the meaning of s. 60 of the Municipal Corporations Act, 1882, to whom the voting papers could be delivered. The sufficiency of that ground depends upon the proper construction of the charter of incorporation of the borough, cl. 7 of which provides that for the purpose of making the Act of 1882 applicable in the case of the first constitution of the borough and for the purpose of carrying into effect the incorporation intended it is Ordered and Directed (sub-cl. 3) that one of two named persons, as the case might be, shall be town clerk of the borough, and that Mr. J. D. Firmston, or in the case of his death, inability, refusal or default Mr. W. Hutter, or in the case of his death, inability, refusal or default Mr. E. A. Medus shall perform the duties of mayor and alderman respectively as returning officer, and of the mayor as summoner of the first meeting of the council, and of the mayor or chairman of the meeting for the election of the mayor and aldermen; and (sub-cl. 7) that subject to the provisions and directions of the charter the provisions of the Act of 1882, so far as unrepealed, and the Acts amending the same, shall apply to the nominations, elections and continuance in office of the first mayor, aldermen and councillors, the first meeting of the town council and all matters and things touching and concerning the above. It appears in view of the circumstances that none of these three persons named to act as mayor was in a position to undertake the duties of chairman of the meeting for the election of aldermen. It is true that they were all alive and that none of them was prevented by illness from taking the chair at the meeting and performing the appropriate duties, but I think that in the case of each of them there was either a refusal or a default. In those circumstances there would be a deadlock, unless cl. 7, sub-cl. 7, of the charter could be prayed in aid. In my opinion that sub-clause did then come into operation, and, the provisions of the charter not being available, the relevant provisions of the Act of 1882 became applicable to the circumstances of this case, and among them those of the Second Schedule, cl. 9—namely: "At every meeting of the council . . . . If both the mayor and the deputy mayor are absent, or the deputy mayor, being present, is not chosen, then such alderman, or in the absence of all the aldermen, such councillor, as the members of the council then present choose, shall be chairman." It is possible that the provisions of cl. 10 of that Schedule also became applicable. In my view Councillor Hedderly was in the circumstances properly chosen to be chairman, and, therefore, the argument for the applicant on that point appears to me to fail.

The second point raised by the appellant, which is one of considerable substance, is that, in view of what took place at the meeting, the election of aldermen purporting to have been held was not an election held in accordance with the law. As the Lord Chief Justice has said, applying the observations of Lord Coleridge C.J. in *Woodward* v. *Sarsons* (1) to the facts of this case, it appears that there was not an election within the meaning of s. 60 of the Act, there having been only a proceeding in the nature of a secret voting by ballot instead of the open election clearly indicated by the provision in that section that the chairman, when the voting papers have been delivered to him, shall "openly produce and read" them.

The only other points which require to be considered are those raised by the contentions on behalf of the respondents, that, if the election was not according to law, the proper remedy is not mandamus, but either quo warranto or an election petition. The answer to these contentions has been given by my Lord. When once it is shown that the persons who are alleged to be in office are not and never have been in office by reason of there having been no lawful election, neither proceedings by quo warranto nor by election

(1) L. R. 10 C. P. 733, 744.

petition have any application, but the remedy is by mandamus to hold an election. As to the particular contention that the remedy should be by an election petition under s. 87 of the Act of 1882, it is plain that that section does not apply to the present case, in which the election is not being questioned on the ground that certain persons have not been duly elected by a majority of lawful votes.

I agree, therefore, that there should be a rule absolute for a mandamus.

BRANSON J. I agree. For the reasons given by my Lord I think it is clear that s. 60 of the Municipal Corporations Act, 1882, contemplates that the election of aldermen shall be conducted openly so that persons interested may know how the votes have been recorded. On the facts here appearing it is clear that by an arrangement entered into before the election in question took place the electors had agreed to conduct the election not in the manner provided for by the Act, but by a method of an altogether different character. As to the question whether the chairman of the election meeting was properly appointed, I am less certain how that should be decided, and if it had been necessary to say whether a mandamus should go on the sole ground that the chairman was not well appointed I should have wished for further time to consider the case. I am inclined to think, however, that the provisions of the Act of 1882 are sufficient to justify the action of the Council in electing a chairman who was not one of those named in the charter.

Rule absolute for a mandamus.

[The writ of mandamus was made peremptory in the first instance with costs.]

Solicitors; *Sharpe, Pritchard & Co.; Lees & Co.*

J. R.

THE KING *v.* NAYLOR.

C. C. A.
1932
March 7.

Criminal Law—Trial—Summing-up—Comment on Failure of Prisoner to disclose Defence after being Cautioned in Police Court—Misdirection—Criminal Justice Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 86), *s.* 12, *sub-s.* 2.

A prisoner, while before the magistrates in the police court, before his committal for trial, was cautioned in the words prescribed by the Criminal Justice Act, 1925, s. 12, sub-s. 2—namely, "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence upon your trial." In reply to that caution, the appellant said: "I do not wish to say anything, except that I am innocent." At the trial at quarter sessions, the Recorder commented on the failure of the appellant to make a more complete statement and said to the jury: "Surely, if he is innocent one would think he would . . . . make his defence then and there." The appellant having been convicted and having appealed:—

Held, that the Recorder had misdirected the jury, the true intention of the caution being to convey to an accused person the information that he is not obliged to say anything unless he desires to do so.

Appeal against conviction and sentence.

The appellant, Reginald Francis Naylor, had been convicted at Grimsby Borough Sessions of shopbreaking and housebreaking and sentenced to six months' imprisonment with hard labour.

At the close of the case for the prosecution, when the appellant was before the magistrates in the police court, before his committal to quarter sessions, he was cautioned in the words prescribed by s. 12, sub-s. 2, of the Criminal Justice Act, 1925—namely: "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence upon your trial." In reply to that caution, the appellant said: "I do not wish to say anything, except that I am innocent."

At quarter sessions, the Recorder, in his summing-up, referred to the caution and the appellant's response to it and said: "Imagine a purely innocent man accused of housebreaking and having these words put to him—'Do you wish to say anything in answer to the charge?' Surely, if he is innocent, one would think he would give some explanation of where he was and what he was doing at the particular time, and would make his defence then and there. . . . . Of course, what lurks in the background of this sort of hanging back and not disclosing his defence is that he gives the prosecution and the police no time to inquire into any statement he may make, so that it might be possible to show that these statements are not true. That is the real reason why many men do not make statements when they are first called upon to do so."

A. M. Lyons for the appellant. The conviction is bad. The Recorder clearly misdirected the jury. The very words adopted by Parliament for the caution in s. 12 of the Criminal Justice Act, 1925, are that the prisoner is "not obliged to say anything unless he desires to do so." In those circumstances it cannot be made a point against him that he did not "make his defence then and there."

Sandlands for the Crown. There was no misdirection. If a defence is an honest one it should be given at the earliest possible stage, otherwise its value is much lessened: per Wills J. in *Rex* v. *Humphries* (1), and the effect of what the Recorder said in the present case does not really go beyond that. *Rex* v. *Moran* (2) is an authority for the proposition that a defence of alibi must be indicated at the earliest possible moment, and that failure to do so may be commented on at the trial.

The judgment of the Court (Lord Hewart C.J., Acton and du Parcq JJ.) was delivered by

Lord Hewart [who stated the facts, and continued:] In our opinion what the Recorder said with regard to the response made by the appellant to the statutory caution constituted a misdirection. This really follows a fortiori from *Rex* v. *Whitehead* (3), where it was held that the fact that a prisoner, when charged and cautioned, makes no denial of the charge cannot be corroboration of evidence given against him. When one looks at the words of the caution in s. 12, sub-s. 2, of the Criminal Justice Act, 1925, which must be taken to have been framed deliberately, it is obvious that they were intended to convey to the prisoner the information that he is not obliged to say anything unless he desires to do so. We do not think that the words of the caution can properly be construed in the sense that the prisoner remains silent after being cautioned at his peril and may find his silence made a strong point against him at his trial. In our view, the words mean what they say, and a prisoner is entitled to reply to the caution that he does not wish to say anything.

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(1) (1903) 67 J. P. 396.
(2) (1909) 3 Cr. App. Rep. 25.
(3) [1929] 1 K. B. 99.

The matter becomes even stronger when one reflects that what was done here was done on the advice of a solicitor. It would be strange if a point could properly be made against a prisoner because, acting on the advice of his solicitor and following the very words of the Act of Parliament, he says that he does not desire to say anything at that stage.

In view of the summing-up in this case the conviction is unsatisfactory and must be quashed.

Conviction quashed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*

Solicitor for Crown: *Director of Public Prosecutions.*

G. F. L. B.

1932
Dec. 9, 12,
13, 15.

MARSHALL AND OTHERS *v.* BLACKPOOL CORPORATION.

Highway—Footpath—Adjoining Landowner—Application by Landowner to form Communication across Footpath—Blackpool Improvement Act, 1879 (42 *&* 43 *Vict. c. cxcix.*), *s.* 62.

By s. 62 of the Blackpool Improvement Act, 1879: "Every person desirous of forming a communication for horses or vehicles across any footpath so as to afford access to any premises from a street shall first submit to the corporation a plan of the proposed communication, showing where it will cut the footpath, and what provision (if any) is made for kerbing and for a paved crossing, and the dimensions and gradients of the necessary works. . . . ."

An owner of land adjoining a highway applied to the corporation for permission to form a communication across a footpath so as to afford access to the highway. Permission was refused on considerations having reference not only to the matters mentioned specifically in the section, but also to matters having reference to the safety of the public, the convenience of pedestrians and vehicles using the street, and to a proposed town planning scheme:—

Held, that at common law the landowner had a right of immediate access to the highway, and that as s. 62 of the above Act contained no unequivocal words taking that common law right away, and as the requirements of the section as to a plan, etc., had been complied with, the corporation had no power to refuse permission.

APPEAL by case stated from Lancashire Quarter Sessions. The appellants at quarter sessions (herein called "the respondents"), William Marshall and Rhodes W. Marshall, were the owners of No. 1 St. Chad's Road, Blackpool, which abutted on the highway. They applied to the respondents at quarter sessions, the Blackpool Corporation (called herein "the appellants"), under s. 62 of the Blackpool Improvement Act, 1879 (1), for permission to form a communication for horses and vehicles from their premises across the footway and duly submitted a plan as required. The corporation refused the application, and in arriving at their determination took into consideration, not only the matters mentioned in s. 62 (1)—namely, the point where the proposed communication would cut the footway, the kerbing, etc., but also other matters such as the safety of the public and the convenience of pedestrians and vehicular traffic; and they also had regard to the powers which they hoped to obtain under their proposed town planning scheme, whereby the portion of the borough in which the above premises and proposed footpath were situated would be zoned for residential purposes only.

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(1) Blackpool Improvement Act, 1879 (42 & 43 Vict. c. cxcix.), s. 62: "Every person desirous of forming a communication for horses or vehicles across any footpath so as to afford access to any premises from a street shall first submit to the corporation a plan of the proposed communication, showing where it will cut the footpath, and what provision (if any) is made for kerbing and for a paved crossing, and the dimensions and gradients of the necessary works, and after having obtained the sanction of the corporation may execute the works at his own expense under the supervision and to the satisfaction of the surveyor, and not otherwise, and if any person drives or permits or causes to be driven any horse or vehicle across any footway unless and until such a communication as aforesaid has been so made he shall be liable to a penalty not exceeding five pounds."

The respondents appealed to quarter sessions on the ground that the corporation had misdirected themselves. Quarter sessions allowed the appeal, but stated this case.

The case is reported because similar sections are found in many local Acts.

Cyril Atkinson K.C. and *Keith Groves* for the corporation. The court of quarter sessions was wrong. The corporation are "trustees for the public of all rights and amenities incident to their property": per Collins M.R. in *Wednesbury Corporation* v. *The Lodge Holes Colliery Co., Ld.* (2), and were entitled to take into account the safety and convenience of the public when considering whether they would sanction a crossing of the footpath. The right of access of the landowner to the highway is subject to the right of passage of the public, and the land dedicated by him to the public is vested in the corporation, and is not a mere easement, "so that the complete vindication of the rights of the public should be preserved" by them: per Lord Halsbury C. in *Tunbridge Wells Corporation* v. *Baird* (3), cited with approved by Collins M.R. in the *Wednesbury Corporation* case. (2) The landowner's right of access is limited to such user as is necessary for the enjoyment of his property, and to such

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(1) Ante, p. 688, note (1).

(2) [1907] 1 K. B. 78, 85.

(3) [1896] A. C. 434, 437.

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enjoyment access to vehicular traffic is not necessary. If the corporation have not the power to prevent owners from cutting the footpath, the consequence might be that every garden on this promenade would be turned into a parking place for stage coaches, which would alter the whole character of the promenade, and the safety and convenience of the public would be jeopardized. The words of the section, "showing where it will cut the footpath," indicate that the corporation may forbid a communication at a particular point.

[*Derham* v. *Culpan* (1) and *Brunswick Property Co.* v. *Blackpool Corporation* (2) were referred to.]

Eastham K.C. and *T. E. Hinchcliffe* for the respondents. Before the Act of 1879 was passed the respondents had all common law rights of ownership not inconsistent with the right of the public to use the footpath—*St. Mary, Newington* v. *Jacobs* (3)—and this would include a right of access to the highway—*Ramuz* v. *Southend Local Board* (4)—as distinct from their right to use the highway as members of the public: *Lyon* v. *Fishmongers' Co.* (5) A local Act which interferes with common law rights must be construed strictly, and an intention to take away the property of a subject without giving him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms: per Lord Atkinson in *Central Control Board (Liquor Traffic)* v. *Cannon Brewery Co., Ld.* (6); and see per Brett M.R. in *Attorney-General* v. *Horner.* (7) No words expressive of such intention are to be found in s. 62. *Tottenham Urban District Council* v. *Rowley* (8) was like the present case, the only difference being that the pathway there was not formed, but Kennedy L.J. said that that made no difference (9), and that the landowner was entitled to cross it with vehicles.

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(1) Unreported. Decided by Divisional Court (Lord Alverstone C.J., Ridley and Darling JJ.) on October 31, 1906.

(2) Unreported. Preston Quarter Sessions, 1907.

(3) (1871) L. R. 7 Q. B. 47, 53.

(4) (1892) 67 L. T. 169, 171.

(5) (1876) 1 App. Cas. 662, 684.

(6) [1919] A. C. 744, 752.

(7) (1884) 14 Q. B. D. 245, 257.

(8) [1912] 2 Ch. 633.

(9) Ibid. 647.

Keith Groves in reply. Sect. 62 contains no words limiting the discretion of the corporation, which must have some discretion, as the section speaks of the necessity of obtaining their sanction.

LORD HEWART C.J. This is a case stated by the court of quarter sessions for the county of Lancaster, and it arises out of an appeal by the present respondents from a refusal by the appellants, the Corporation of Blackpool, under s. 62 of the Blackpool Improvement Act, 1879, to sanction the making and construction of a communication across a footpath, desired by the respondents at and from No. 1 St. Chad's Road, Blackpool. Sect. 62 is as follows: [His Lordship read it. (1)]

The appeal of the respondents was allowed at quarter sessions upon the ground (which the case finds as a fact) that, in the opinion of that court, the corporation had misdirected themselves and that in arriving at a decision upon the application the appellants had taken into consideration not only the matters specifically mentioned in s. 62 of the Act—namely, the point at which the proposed communication would cut the footpath, the provision (if any) made for kerbing and for a paved crossing, and the dimensions and gradients of the necessary works—but also other matters to which no specific reference is made in the section; and the opinion of the court of quarter sessions was that the corporation, in arriving at a decision upon the application, were not entitled to consider any matters other than those specifically mentioned in s. 62 of the Act. There was some doubt as to the nature of the matters which, in the view of the court of quarter sessions, had been improperly taken into account, and accordingly this Court requested that court to say what those matters were, and we now have before us a further case in which those matters are set out, and they are two: First, they say that they considered "that the town planning and by-laws sub-committee of the corporation had taken into consideration matters in regard to the safety of the public and the convenience of pedestrians and vehicular traffic which might use St. Chad's Road; secondly, that the sub-committee had regard to certain powers which they hoped to obtain under their proposed town planning scheme whereby this portion of the borough would be zoned for residential purposes only." The court of quarter sessions adds this statement: "Views were expressed as to the desirability of the crossing in question but the magistrates came to no decision on that point, because it having been held in law that the owners of land and premises abutting on the highway have an absolute right of access to the highway, this right was not taken away by the Blackpool Improvement Act, 1879."

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(1) Ante, p. 688, note (1).

Our attention has been directed to certain cases, one before this Court, where the argument was on one side only, *Derham* v. *Culpan* (1), decided on October 31, 1906, the other being *Brunswick Property Co.* v. *Blackpool Corporation* (2) in 1907, decided by the court of quarter sessions at Preston, but in my view neither of those cases is binding upon us.

It is important to consider, with a view to the true construction of this section, what was the state of the law before the local Act was passed. In the case of *St. Mary, Newington* v. *Jacobs* (3), Mellor J., delivering the opinion of the Court of three judges, said this (4): "The owner, who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership, not inconsistent therewith; and the appropriation, made to and adopted by the public, of a part of the street to one kind of passage, and another part to another, does not deprive him of any rights, as owner of the land, which are not inconsistent with the right of passage by the public." He added, on the same page: "We think that the provisions of the Highway Acts and the Metropolis Local Management Act, so far as they apply to roads or streets, are subordinate to the paramount rights reserved by the owner. We do not deny that the owner cannot derogate from the grant of roadway made by him to the public, and cannot do anything which would really and substantially interfere with the right of passage by the public. So far as we are aware, no case is to be found in the books which conflicts with the view of the law above expressed, notwithstanding the numerous instances which must have occurred, in which an owner, rebuilding or changing the character of his houses or other buildings, has made crossings of the footpath, in order to carry into effect some object of convenience or business." Again, in the case of *Lyon* v. *Fishmongers' Co.* (1) Lord Selborne uses these words: "If I correctly understand the Irish case of *Moore* v. *Great Southern and Western Ry. Co.* (2), which was approved and followed by the English Court of Queen's Bench in *Chamberlain* v. *Crystal Palace Ry. Co.* (3), those authorities recognise such a right of immediate access from private property to a public highway, as a private right, distinct from the right of the owner of that property to use the highway itself, as one of the public." In the year 1912, when a local Act was being considered, in *Tottenham Urban District Council* v. *Rowley* (4), Cozens-Hardy M.R. said: "I may add that section 62 of the Tottenham Local Board Act, 1890 (53 & 54 Vict. c. ccxliv.), seems to recognize and at the same time to regulate the right to cross a kerbed footpath." That section of the Tottenham Local Board Act, 1890, is curiously similar to s. 62 of the Blackpool Improvement Act, 1879, in the present case. Mr. Eastham accordingly contends that if the effect of section 62 of the Blackpool local Act of 1879 is to interfere with the rights of ownership, then it must be clearly and unambiguously expressed. He referred, in support of the general proposition, to the well known case of *Central Control Board (Liquor Traffic)* v. *Cannon Brewery Co., Ld.* (5) where Lord Atkinson, referring to what he described as a canon of construction of

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(1) Unreported. Ante, p. 690, note (1).

(2) Unreported. Ante, p. 690, note (2).

(3) L. R. 7 Q. B. 47.

(4) Ibid. 53.

(1) 1 App. Cas. 662, 684.
(2) (1859) 10 Ir. C. L. Rep. 46.
(3) (1862) 2 B. & S. 605, 617.
(4) [1912] 2 Ch. 633, 644.
(5) [1919] A. C. 744, 752.

statutes well recognized, said: "That canon is this: that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms." Finally, in the case of *Attorney-General* v. *Horner* (1), Brett M.R. said: "It seems to me that it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it. If it is clear and obvious that Parliament has so ordered, and there is no other way of construing the words of the Act, then one is bound to so construe them, but if one can give a reasonable construction to the words without producing such an effect, to my mind one ought to do so."

I think that those observations in those cases are applicable to the present case, and throw light upon the construction which we ought to give to s. 62 of the Blackpool Improvement Act, 1879. It is to be observed that although what is spoken of is a communication for horses or vehicles across a footpath, all that the person desirous of forming that communication has to do is to submit a plan of the proposed communication. He is not required to give any particulars as to the nature of the user or the particular purposes for which he desires to form the communication.

In those circumstances, without dealing further with the various cases which have been cited to us, it seems to me that we cannot say that the court of quarter sessions came to a wrong decision in point of law, and it follows, therefore, that in my opinion—expressed not without reluctance, because I know something of the history of this legislation—this appeal fails and ought to be dismissed.

AVORY J. I am of the same opinion. The present respondents are stated in the case to be the owners of No. 1 St. Chad's Road, and those premises adjoin the said highway. Under those circumstances, prima facie, they are

(1) 14 Q. B. D. 245, 257.

entitled to a right of access with a vehicle or vehicles from their premises on to that highway, and the authorities which my Lord has cited show conclusively that such a right cannot be presumed to be taken away by any local and personal Act unless the words in the local and personal Act are so clear as to admit of no other construction. In my opinion, the words of s. 62 do not purport, and ought not to be construed as being intended, to take away this common law right of the respondents without any compensation at all. It seems to me that the object of s. 62 is to prevent persons who have that right from exercising it by driving vehicles over the footpath, which they have no right to do if in doing so they either actually cause, or are likely to cause, damage to the surface of the footpath ; and so the section is framed for the purpose of enabling the appellants to give their sanction to a proper communication being formed, so that passengers on the footpath shall not be injured or inconvenienced.

With reference to the words of the section, which were much relied upon by the appellants, which enact that the plan which is to be submitted must show where the proposed communication will cut the footpath, they contend that their effect is that it was within the discretion of the appellants to forbid a communication being made at a particular point. In my opinion that is not the proper meaning of the words " showing where it will cut the footpath," and those words do not give the appellants power to say that they will not allow the footpath to be cut at a particular place, which may be, in some circumstances, the only place where the owner of the adjoining property can get access to the highway. There is all the difference in the world, as is shown by several decided cases, between the right of a person to have access to the highway and the right of the adjoining owner to drive over the footpath in a manner which may damage the actual surface of the footpath. I think the whole purport of this section is to ensure that the interests of the foot passengers shall not be interfered with by persons driving over that footpath without having made a proper communication. So much for the construction of s. 62.

I desire to add that I am satisfied that the court of quarter sessions in this case was right in deciding that, upon the admissions which were made at the hearing, it was obvious that the appellants had taken into consideration matters which they were not entitled to consider; in other words, matters which were extraneous to the performance of their duty under the section. Upon the further information supplied to the Court as to what those were, it is said, first, that they took into consideration matters in regard to the safety of the public and the convenience of pedestrians. So far, I think it is quite possible that with regard to those plans and the proposed kerbing, etc., and the gradients, they may properly consider them in reference to the safety of the public or the convenience of pedestrians, but it is also said that they have taken into consideration the vehicular traffic which might use St. Chad's Road. I do not see how they can properly take that into account. Further, it is, I think, abundantly clear that they had no right to have regard to certain powers which they hope to obtain under their proposed town planning scheme, whereby this portion of the borough would be zoned for residential purposes only. It may be that if that ever takes place, the residences which will be erected upon this portion may require this access to the highway, and the fact that they will be residences only and not business premises cannot possibly interfere with the right of the owners of those residences to have access to the highway. Therefore, I agree that the court of quarter sessions was right in allowing this appeal from the refusal of the appellants to sanction this communication.

BRANSON J. I am of the same opinion. It is unnecessary for me again to refer to the cases cited by my Lord as establishing the true proposition, first of all, that an adjoining owner has at common law an immediate right of access to the highway; and, secondly, that in construing a local

Act of Parliament the Court should not, unless it is driven to do so by express language, hold that the Legislature has intended to take away a private right without providing compensation for it. The question, then, becomes one of construction of s. 62 of the Blackpool Improvement Act, 1879. For my part, so far from finding in it any language which leads me to hold that it has taken away the common law right of an adjoining owner to immediate access to the highway, I think that the language is clear in the contrary direction. The words, and I think the only words, really relied upon as indicating an intention on the part of the Legislature to take away the right of the adjoining owner, are the words which provide that a person desirous of forming a communication for horses or vehicles across the footpath shall first submit to the appellant corporation a plan showing where it will cut the footpath. To my mind, it is quite unnecessary to assume that the reason for providing that such a plan shall be submitted is that the Legislature intended to give the corporation a right of deciding whether or not it would have a crossing there at all. It seems to me that it is necessary that a plan, upon which the local authority is to exercise its judgment with regard to kerbing, or whether there should be a paved crossing, and as to the gradients of the work which it is proposed to do, should show where the communication is going to cut the footpath. I think, therefore, as I have said, that so far from there being unambiguous language showing an intention to confer upon the local authority a power to deprive the adjoining owner of his common law right, there is nothing in the section from which it can be gathered that such was the intention of the statute. For these reasons I am of opinion that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Sharpe, Pritchard & Co., for D. L. Harbottle, Town Clerk, Blackpool.*

Solicitors for respondents: *Johnson, Peacock & Co., for James E. Harrison, Blackpool.*

W. L. L. B.

1933
Jan. 13.

MILNER *v.* ALLEN.

Criminal Law—Road Traffic—Prosecution for Careless Driving—Notice of intended Prosecution—Sufficiency—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 21.

The appellant was charged before a court of summary jurisdiction with driving a motor vehicle without due care and attention, contrary to s. 12 of the Road Traffic Act, 1930. No warning had been given to him under s. 21 (*a*) of the Act at the time of the alleged offence, nor was a summons served within fourteen days thereafter; but a notice was sent to him by the Chief Constable two days after the alleged offence by registered post, stating:—

"In accordance with the provisions of the Road Traffic Act, 1930, s. 21, I have to give you notice that you have been reported for the question of prosecution to be considered in respect of your having driven a motor-car, PK 8770, in a manner dangerous to the public in . . . ." [the time, place and circumstances of the alleged offence were stated with particularity].

A summons was issued later for driving without due care and attention at that time and place.

The appellant objected that this was not a valid notice under s. 21 in that (*a*) it was a notice not of an intended prosecution, but merely that the question of prosecution was being considered; and (*b*) that the offence referred to in the notice was "driving in a manner dangerous to the public," i.e., an offence against s. 11 of the Act, whereas the offence charged was "driving without due care and attention" under s. 12:—

Held, that the notice was good. It was not necessary that a prosecution should have been irrevocably decided upon before the notice was sent out. The notice sent sufficiently specified the "nature of the alleged offence" with all particulars necessary to recall the mind of the motorist to the facts on which it was intended to rely. "Driving to the danger of the public" was not a term of art referable only to the offence created by s. 11, and an accused person was not entitled to object that he was charged with a less serious offence than the prosecution had originally contemplated.

CASE stated by Rochester justices.

The appellant, Edward Cecil Milner, was charged on an information preferred by the respondent, Herbert Clifford Allen, Chief Constable of the City of Rochester, under s. 12 of the Road Traffic Act, 1930, for that he on May 2, 1932, in the said city unlawfully did drive a motor-car on a certain road there without due care and attention.

No warning was given to Mr. Milner at the time of the alleged offence, but on May 4, 1932, a notice under s. 21 of the Road Traffic Act, 1930 (1), in the following form was sent to him by registered post by the respondent :—

" Sir,—In accordance with the provisions of the Road Traffic Act, 1930, s. 21, I have to give you notice that you have been reported for the question of prosecution to be considered in respect of your having driven a motor-car, PK 8770, in a manner dangerous to the public in High Street, Rochester, at 9.45 A.M. on Monday, May 2, 1932, by overtaking a horse-drawn vehicle and cutting in between same and a motor-omnibus proceeding in the opposite direction.—Yours faithfully,

H. C. ALLEN, Chief Constable."

The appellant objected that this notice was bad on the grounds : (*a*) that it was not a notice of an intended prosecution, but only of the fact that the question of prosecution would be considered ; and (*b*) that if it was a notice of an intended prosecution it was a notice of a prosecution for driving recklessly or in a manner dangerous to the public under s. 11, whereas he was charged with driving without due care and attention under s. 12.

It was contended for the respondent that a notice relating to dangerous driving under s. 11 was sufficient to cover a charge of careless driving under s. 12, and that the appellant was not in any way prejudiced.

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(1) Sect. 21 of the Road Traffic Act, 1930, provides : "Where a person is prosecuted for an offence under any of the provisions of this Part of this Act relating respectively to the maximum speed at which motor vehicles may be driven, to reckless or dangerous driving, and to careless driving he shall not be convicted unless either—(*a*) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the provisions aforesaid would be taken into consideration ; or (*b*) within fourteen days of the commission of the offence a summons for the offence was served on him ; or (*c*) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence. . . ."

The justices were of opinion that the requirements of s. 21 had been complied with, and that Mr. Milner was not in any way prejudiced in his defence. The notice served on him gave him adequate notice of the essential facts in the case, and the summons was for an offence of less serious nature than that specified in the notice. They accordingly convicted him.

Vine for the appellant. The justices were wrong in holding that the appellant was not prejudiced. The charge of dangerous driving under s. 11 is a very much more serious one than that of careless driving under s. 12, and it might well be that a defendant who would plead guilty to the latter charge, and possibly content himself with writing a letter admitting the offence, would take serious and expensive steps to defend a charge under s. 11.

The language of para. (*c*) of the section is in sharp contrast with that of para. (*a*). Where the warning is given at the time it is sufficient that it should be a warning that "the question of prosecuting him for an offence under *some one or other* of the provisions aforesaid would be taken into consideration." The constable, in other words, is not to be required on the spur of the moment to commit his superiors, or to say whether they will prosecute, or, if so, on what charge. His duty is to report, and to warn the offender that he is going to report, the alleged offence, for the question of prosecution to be considered.

But when one comes to para. (*c*), the notice is to be a notice of "the intended prosecution," it is to specify "the nature of the alleged offence" and the time and place where it is alleged to have been committed. The inference is that the Legislature intended that the notice should emanate from the responsible official who had by that time applied his mind to the questions, first, whether the case was a proper one for prosecution; and secondly, having made up his mind to prosecute, what was the proper charge.

[AVORY J. You are suggesting that the notice must be as precise as the summons. If that is so, why should not the summons be issued in the first place?]

Very often it is; but it may be difficult to ensure service of the summons within the fourteen days. It is sufficient to send the notice by registered post, and it may be sent to the registered owner of the vehicle instead of to the offender. But it is submitted that it must be precise in its terms, so that the accused may take steps to prepare his defence.

Cassels K.C. and *G. A. Thesiger* for the respondent. It is said that the appellant having received notice of an intended prosecution for dangerous driving is prejudiced, because he is charged only with careless driving. But he knew when he received the summons that careless driving would be the charge. The summons must be precise; the notice is merely to keep in the offender's mind the facts which may be the substance of a charge.

[AVORY J. Until he receives the summons he is under no obligation to prepare any defence.]

"Notice of intended prosecution" means no more than notice of a prosecution which we, the police, are thinking of instituting. Under the Motor Car Act, 1903, the notice used to be given by the officer at the time of the offence: "You will be reported for a summons."

The phrases "reckless or dangerous driving" and "careless driving" in s. 21 seem to be derived from the marginal notes to ss. 11 and 12. They are not terms of art, and a notice of intended prosecution for driving in a manner dangerous to the public may be completed by a summons under either section. In any event, an accused person cannot be heard to complain that the prosecution might have charged him with a more serious offence.

[They were stopped.]

Vine in reply.

LORD HEWART C.J. In this case the only point is whether s. 21 of the Road Traffic Act, 1930, has been complied with. It is contended on the part of the appellant that it has not been complied with by reason of the terms of the notice dated May 4, 1932. That notice referred to s. 21; it referred to a prosecution; it referred to the day and the hour and it set out the material facts which were alleged against the

Lord Hewart C.J.

defendant—namely, that he drove his car so as to overtake a horse-drawn vehicle and cut in between it and a motor-omnibus proceeding in the opposite direction.

In my opinion, para. (*c*) of s. 21 ought to be read in close connection with para. (*a*) of that section. The object of the notice is to take back the recollection of the motorist to the facts upon which reliance is to be placed. I do not know that the matter can be more aptly expressed than in para. 8 of the Case where the justices use these words: "We were of the opinion that the requirements of s. 21 of the Road Traffic Act, 1930, had been complied with, and that the said Edward Cecil Milner" (the appellant) "was not in any way prejudiced in his defence." The notice served on him gave him adequate notice of the essential facts in the case, and the summons was of a less serious nature than was indicated in the notice under s. 21 of the Road Traffic Act, 1930. Mr. Vine has spoken throughout as if the words "in a manner dangerous to the public" were to be regarded as a term of art referring, and referring only, to s. 11 of the Act. I do not take that view of it.

I think in regard to the point on the words "intended prosecution" the judgment of Lord Alverstone C.J. in *Jessop* v. *Clarke* (1) is useful and in point.

In my opinion here this notice was a sufficient compliance with s. 21 of the Act, and I think therefore that this appeal ought to be dismissed.

AVORY J. I am of the same opinion. I do not and cannot assent to the argument of Mr. Vine that the words in para. (*c*) of s. 21 "a notice of the intended prosecution specifying the nature of the alleged offence" necessarily mean that the notice must be a notice of the particular section of the Act under which the prosecution is contemplated. Nor do I assent to the argument that at the time when that notice is given it is necessary that the police officer or other authority should have definitely made up his mind which particular charge is to be made. In my opinion, this notice that was given was a sufficient notice of an intended

(1) (1908) 72 J. P. 358.

prosecution and it did specify the nature of the alleged offence and the time and place where it was alleged to have been committed. I do not think that the appellant can be heard to complain, even if the notice did suggest that he might be charged under s. 11, that in point of fact he was only summoned for an offence less serious than that under s. 11.

I agree, therefore, that the appeal should be dismissed.

BRANSON J. I agree that para. (*c*) of s. 21 has to be read in connection with para. (*a*). Para. (*a*) applies where a motorist is stopped at the time when the offence is committed; para. (*c*) when for one reason or another the motorist was not stopped. I can see no reason for supposing that the Legislature intended that the motorist who was not stopped at the time the offence was committed was to have better particulars, either of the actual offence with which he might be charged or of the fixed intention of the Chief Constable to charge him with some offence, than the motorist who was stopped at the time when the offence was committed.

With regard to the particularity of the notice required I would only add this, that the words of para. (*c*) are "specifying the nature of the alleged offence" and not, as one would suppose they would have been had it been the intention that the actual offence should be particularized, "specifying the offence" or "the particular offence."

With regard to the other point, it seems to me that the words "a notice of the intended prosecution" can in this collocation mean no more than a notice that a prosecution was in contemplation. There is no reason for applying to the word "intended" the meaning that that intention should have been irrevocably arrived at before the notice is sent out.

I agree entirely with what has been said by my Lord and my brother Avory, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Amery-Parkes & Co.*

Solicitor for respondent: *Sir Ernest Hiley, for John L. Percival, Town Clerk, Rochester.*

J. W. H.

C. C. A.
1933
Jan. 11.

THE KING *v.* STRINGER.

Criminal Law—Road Traffic—Manslaughter—Second Count for Dangerous Driving—Acquittal of Manslaughter—Conviction of Dangerous Driving—Autrefois acquit—Whether Verdict sustainable—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 11.

The appellant was charged on an indictment containing two counts: (1.) manslaughter of a man who was knocked down and killed by the appellant's motor lorry; (2.) driving the lorry in a manner dangerous to the public, contrary to s. 11 of the Road Traffic Act, 1930. The jury acquitted the appellant of manslaughter, but convicted him of dangerous driving. On a submission that this verdict was bad, in that the mens rea required for the two offences was identical, and that it was therefore impossible for the jury to negative that mens rea on the first count, and to find it proved on the second, MacKinnon J. overruled the submission, and upheld the conviction. He sentenced the appellant to one month's imprisonment in the second division, but admitted him to bail, and granted a certificate that the case was fit for appeal:—

Held, by the Court of Criminal Appeal, that the conviction was right. Each count in an indictment is a separate indictment, and since the appellant on an indictment for manslaughter could not have been convicted of dangerous driving, he could not have pleaded autrefois acquit if the charge of dangerous driving had been tried separately.

It is, however, in the opinion of the Court, undesirable that a charge of dangerous driving should be made a count in an indictment for manslaughter. Where the prosecution desire to prefer both charges they ought to do so in two separate indictments.

Appeal against conviction on certificate.

The appellant, Bertram Stringer, was a lorry driver, and on October 5, 1932, he was driving a lorry from Bristol in the direction of Gloucester. At Cam, about half-way between Bristol and Gloucester, a gang of roadmen in the employment of the Gloucestershire County Council were engaged in tarring the near side of the road, on the "blind" side of a corner to any one coming from Bristol. They had put on the corner, a considerable distance in front of them, a warning notice with a red flag.

The appellant, who was travelling at about twenty-three miles an hour, did not slacken speed as he approached the corner with the warning, but went on in spite of signals from two of the men to stop. Round the corner he saw another

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lorry coming in the opposite direction. Owing to the tarring there was not room to pass, and in endeavouring to avoid the other lorry the appellant collided with the roadmen's tarpot and struck a man named Charles Nelmes, who was killed on the spot.

The appellant was charged before MacKinnon J. at Gloucestershire Assizes on an indictment containing two counts: (1.) manslaughter of Charles Nelmes; (2.) driving a motor vehicle at that time and place in a manner dangerous to the public contrary to s. 11, sub-s. 1, of the Road Traffic Act, 1930. (1)

MacKinnon J. gave the jury the direction with regard to the negligence necessary to constitute manslaughter laid down in *Rex* v. *Bateman* (2), and told them that it would be a matter of difficulty to distinguish with precision between the degree of negligence required to justify a conviction of manslaughter and that required to convict on the second count, and he said that he should not attempt to do so. In the result the jury acquitted the appellant of manslaughter, but convicted him on the count for dangerous driving.

His counsel thereupon submitted that the verdict was bad in law on the face of it on the ground that the mens rea required for the two offences was identical, manslaughter in these circumstances being merely dangerous driving from which a death had in fact resulted. Therefore, it was argued, the jury, having negatived the existence of that mens rea on the first count, could not immediately find the same mens rea proved on the second count. Or, from another point of view, if the appellant was driving to the danger of the public, it was an unlawful act, and if death resulted from that unlawful act it became ipso facto manslaughter. It was wholly inconsistent for the jury in the same breath to acquit of manslaughter and convict of the unlawful act (there being no question that death resulted from the act). He supported this submission by reference to a case tried before Branson J. on circuit, where the learned judge upheld a similar submission. (1)

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(1) The Road Traffic Act, 1930, s. 11, sub-s. 1: "If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be liable . . . . (*b*) on conviction on indictment to imprisonment for a term not exceeding six months or to a fine, or to both such imprisonment and fine."

(2) (1925) 94 L. J. (K. B.) 791.

MacKinnon J. overruled the submission, and sentenced the appellant to one month's imprisonment in the second division, but admitted him to bail, and granted a certificate that it was a fit case for appeal.

The appeal was first argued in Michaelmas Sittings, 1932, before Lord Hewart C.J., Avory and Branson JJ., when judgment was reserved, and it was now ordered to be reargued before a fuller Court.

R. C. Hutton for the appellant. The submission in the Court below was made in reliance on a decision of Branson J. (1) that where there has been an acquittal of manslaughter there cannot be a conviction for dangerous driving founded on the same facts. That is submitted to be the correct view of the law. There is only one kind of mens rea which must be present to constitute an offence under s. 11 of the Road Traffic Act—namely, "recklessness."

In s. 1, sub-s. 1, of the Motor Car Act, 1903, the words used were "recklessly or negligently, or at a speed or in a manner which is dangerous to the public." The word "negligently" is omitted from the Road Traffic Act, 1930—presumably because it is ambiguous, and might mean either recklessness or thoughtlessness. The new Act is more precisely worded, the matters covered by the old section being now divided into two sections—the thoughtless driver being dealt with under s. 12, while s. 11, with its much more severe penalties, is confined to the driver who is guilty of recklessness. There is no distinction which can be drawn between that recklessness and the recklessness defined by the Court in *Rex* v. *Bateman*. (2) Manslaughter is

(1) See Law Journal newspaper, June 27, 1931, at p. 437.

(2) 94 L. J. (K. B.) 791.

distinguished from dangerous driving only by the fact that death has resulted. There is no additional criminal act or intent on the part of the accused.

[AVORY J. If there had been two indictments and the accused had been acquitted of manslaughter, do you say that he could have pleaded autrefois acquit to the charge of dangerous driving ?]

No; technically he could not, for since there is no provision in the Act to authorize a jury on an indictment for manslaughter to convict of dangerous driving, he was never in jeopardy on the lesser charge. But it is submitted that the Court should quash the verdict on the second count as being inconsistent with that on the first count. It shows such confusion of mind in the jury that it ought not, in justice, to be allowed to stand.

[BRANSON J. Speaking for myself, I should consider it my duty so to direct the jury as to ensure an acquittal on the dangerous driving charge in those circumstances.]

[AVORY J. It is admitted that there could be no plea in bar with regard to the second count: why then should not the jury convict on it ? A man may be acquitted of rape and subsequently convicted of a common assault on the same facts, because he has never been in jeopardy on that charge.]

The analogy, with respect, is imperfect. Rape, it is true, necessarily includes an assault, but it also necessarily includes further elements of aggravation of a criminal nature on the part of the offender. There is nothing inconsistent in a jury negativing the elements of aggravation, while accepting the evidence of a common assault. In the case of manslaughter and dangerous driving—unless there is doubt whether death resulted from the act of the accused, which is not disputed here—the only element which the jury can find not proved is the very same recklessness which in the second count is alleged to constitute dangerous driving.

[LORD HEWART C.J. If death results from reckless driving, can the driver be charged only under s. 11 of the Road Traffic Act, without any charge of manslaughter ?]

It is open to the Crown to proceed only on the lesser charge if they think it proper, but it would be unusual.

[CHARLES J. May not the two offences be different in their nature? Suppose that a man had been driving dangerously for miles, and that on topping a rise he saw a gang of men ahead. He might then slow down and drive on to the verge at the risk of his own life in an effort to avoid them. If one of the men was killed might not the jury acquit of manslaughter on the ground that the driver had not displayed a reckless disregard of human life, but convict of the antecedent dangerous driving?]

Of "antecedent" dangerous driving, no doubt, if that is charged, for that would be a separate and distinct offence in fact, as well as in law. But where, as here, the only dangerous driving alleged is the very thing which caused death, then the verdict must be manslaughter or nothing. Every act of criminal negligence from which death results, or any act in breach of a statute from which death results, is manslaughter.

[HUMPHREYS J. If a man drives "without due care and attention" in breach of s. 12 of the Road Traffic Act, 1930, and kills some one, do you say he is guilty of manslaughter?]

It seems so, for he is doing an unlawful act. *Rex* v. *Bateman* (1), it is to be remembered, was a case of manslaughter by the doing of an act in itself lawful. If death results from such an act it is only manslaughter if the jury find that it was done with criminal negligence in the sense defined in that case. But where the act is in itself unlawful, then, it is submitted, if death results it is manslaughter, irrespective of negligence. In *Reg.* v. *Senior* (2) Wills J. directed the jury that "if he [the prisoner] had done anything which was expressly forbidden by statute, and by so doing had caused or accelerated the child's death, he would be guilty of manslaughter, no matter what his motive or state of mind." That summing-up was approved by the Court for Crown Cases Reserved (Lord Russell of Killowen C.J., Day, Wills, Grantham, Lawrance and Wright JJ.)

(1) 94 L. J. (K. B.) 791. (2) [1899] 1 Q. B. 283, 285.

So, in the case put by Humphreys J., a man driving without due care and attention in breach of s. 12 is committing an unlawful act, and if death results it is manslaughter.

The real bearing of *Rex* v. *Bateman* (1) on this case is to define the negligence which converts the lawful act of driving a motor-car into the criminal act of driving it "recklessly or in a manner dangerous to the public," which is the same negligence required to make the doing of a lawful act into manslaughter if death results. In other words, the distinction is not between recklessness amounting to manslaughter and some lesser recklessness amounting to dangerous driving, but solely between criminal negligence (manslaughter or dangerous driving, it matters not which) and civil negligence. Those are the only two kinds of negligence known to the law.

[Branson J. Your point is that the jury could not say that the appellant's negligence was criminal for the purposes of the Road Traffic Act, 1930, when they had already said that it was not criminal for the purposes of manslaughter.]

Precisely. There are no degrees of criminal negligence in general—it is only by statute that driving "without due care and attention" is specifically made an offence, though to do many other things without due care and attention would not be criminal.

If, however, the Court is against me as to this, and holds that the two offences are distinct in the degree of negligence involved, then the jury were not directed as to the degree of negligence necessary to support the charge under s. 11 as distinct from the charge of manslaughter. Indeed, the learned judge expressly declined to define the distinction.

Wilfrid Price for the Crown. Manslaughter and dangerous driving are entirely distinct offences, and the test whether a plea of autrefois acquit could be set up is one of substance, not a mere technicality. It is well settled that to support the plea it is not enough that the facts must be the same—the offences must either be the same, or such that on the first trial the jury might have convicted on the charge in the

(1) 94 L. J. (K. B.) 791.

second indictment. For example, a man acquitted of murder cannot be subsequently indicted on the same facts for manslaughter, because the jury which tried him for murder might have convicted of manslaughter, and he has therefore been in jeopardy on that charge. But in the present case, if the charges of manslaughter and dangerous driving had been in two indictments, the jury on the first indictment could not have brought in a verdict of dangerous driving, and therefore the plea of autrefois acquit would not have been available on the second indictment.

The case of *Rex* v. *Burdon* (1) is an authority for the proposition that on a charge of wanton or furious driving under s. 35 of the Offences against the Person Act, 1861, it is not necessary to give the jury the direction as to criminal negligence appropriate in a case of manslaughter. The fair inference is that the Court in that case thought that a different and less degree of negligence would suffice to support a charge of wanton or furious driving.

[BRANSON J. What do you say is the difference between the degree of negligence necessary on a charge of manslaughter and the degree of negligence necessary on a charge under s. 11 ?]

On a charge of manslaughter the direction must be in substance that laid down in *Rex* v. *Bateman.* (2) Under s. 11 the direction need only deal with the words of the section, in which the word "negligent" does not occur. In the present case it is possible that the jury may have felt some difficulty in convicting of manslaughter: they can hardly have had any doubt that the appellant was driving in a manner dangerous to the public.

R. C. Hutton replied.

The judgment of the Court (LORD HEWART C.J., AVORY, BRANSON, CHARLES and HUMPHREYS JJ.) was delivered by

LORD HEWART C.J. This appellant, Bertram Stringer, was charged at Gloucester Assizes upon an indictment which contained two counts: the first was that on October 5,

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(1) (1927) 20 Cr. App. R. 80.

(2) 94 L. J. (K. B.) 791.

1932, he unlawfully killed one Charles Nelmes, and the second count was under s. 11 of the Road Traffic Act, 1930, that on that day he drove a motor vehicle in a manner dangerous to the public. The appellant was found guilty on the second count and sentenced to one month's imprisonment in the second division. The learned judge granted the appellant a certificate that the case was fit for appeal, and it has been twice heard, first of all before a Court of three judges and now before the present Court.

The accident took place on the Bristol–Gloucester road at a spot where there is a bend in the road, and at the time of the accident that part of the road was under repair; a number of men were at work on the road and one of those men was killed by being run down by a lorry which was being driven by the appellant and which was coming from the direction of Bristol. The men at work on the road were just preparing to stop for the midday meal, and one of the men went to the danger flag placed in the road in order to pull it a little further into the road. As he took that step he observed a large lorry coming from the direction of Gloucester, and that lorry was going at a moderate speed. He also noticed another lorry coming from the direction of Bristol, and that lorry, he said, was coming at a fast speed. He put his hand above his head as a signal to stop to the Bristol lorry—that was the appellant's lorry—and one of his mates also put his hand up, but the appellant drove his lorry past them and an accident occurred when the appellant saw the lorry which was approaching him and coming from Gloucester. The appellant's lorry struck the tarring machine which was on the road and knocked down and killed a man who was with the other two. It is not necessary, I think, to enter further into the facts of the case.

It has been contended before us that the verdict of the jury in acquitting on the charge of manslaughter and convicting under s. 11 of the Road Traffic Act, 1930, was a totally inconsistent verdict. We have listened with great attention to the argument of Mr. Hutton. He has also argued that the summing-up of MacKinnon J. was insufficient, but as far as the summing-up is concerned we do not think that it is open to the criticisms which have been made upon it.

With regard to these two counts it is to be observed that each count in an indictment is really a separate indictment, and it is conceded that upon the first count of this indictment—namely, the count which charged manslaughter, the appellant could not have been convicted of the offence under s. 11 of the Road Traffic Act, 1930; in other words upon the charge of manslaughter the appellant was never in jeopardy in respect of the charge under the Road Traffic Act, 1930. If there had been two separate indictments tried at two separate times he could not in reply to the charge under s. 11 of the Act of 1930 have put forward successfully a plea of autrefois acquit.

We have come to the conclusion that the conviction must stand, but there are two observations to be added. One is that in the opinion of the Court it is not desirable that a charge under s. 11 of the Road Traffic Act, 1930, should be made in a count in an indictment which charges manslaughter. If the two charges are to be made, the proper practice, in our view, is that there should be two separate indictments, and if that course is followed the confusion which may conceivably have arisen here will be avoided.

The second and remaining observation is with regard to this man's sentence. It is quite true that he appeals only against conviction, but it is to be observed that he was sentenced so long ago as October 26, 1932, and the case was in the list on November 28 and again on December 5 and 6, so that the case has been hanging over the appellant for a considerable time. In view of the special circumstances, and in view not least of the fact that leave to appeal was given, we think that this sentence may properly run from the time of conviction, which means that the appellant will be discharged. That does not in the smallest degree involve the conclusion that this Court takes any lenient view of dangerous or reckless driving of motor vehicles or the causing of death by dangerous and reckless driving. I am dealing only with the particular circumstances of this present case. The form of order will be that the sentence is altered from one month to one day, and the appellant will now be discharged.

Appeal dismissed: sentence reduced.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*

Solicitors for the Crown: *Wellington & Clifford, Gloucester.*

J. W. H.

1933
Jan. 31;
Feb. 1.

S. SOUTHERN (INSPECTOR OF TAXES) *v.* A. B.

SAME *v.* A. B., LIMITED.

Revenue—Income Tax—Profits arising from Trade—Illegal Trade—Whether Profits assessable—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case I.*

The respondents carried on street betting and ready-money betting businesses which were wholly illegal:—

Held, that there was a "trade" carried on by the respondents within Case I. of Sch. D of the Income Tax Act, 1918, and, that being so, the fact that that trade was illegal did not prevent the profits arising therefrom being assessable to income tax.

Mann v. *Nash* [1932] 1 K. B. 752 approved and applied.

Hayes v. *Duggan* [1929] I. R. 406 not followed.

Lindsay v. *Commissioners of Inland Revenue* 1933 S. C. 33 considered.

CASE stated by Special Commissioners of Income Tax.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on February 18, 1932, the respondent, A. B., appealed against assessments made on him under Sch. D of the Income Tax Acts (1) as follows:—

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(1) By the Income Tax Act, 1918, Sch. D:—

"1. Tax under this Schedule shall be charged in respect of—(*a*) The annual profits or gains arising or accruing—. . . . (ii) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere. . . . .

2. Tax under this Schedule shall be charged under the following cases respectively; that is to say,—Case 1—Tax in respect of any trade not contained in any other Schedule . . . ."

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For the year ended April 5, 1928, in the sum of 883*l*.
,, ,, ,, ,, 1930, ,, ,, 3087*l*.
,, ,, ,, ,, 1931, ,, ,, 900*l*.
,, ,, ,, ,, 1932, ,, ,, 1000*l*.

Before 1926 A. B. had carried on a business as a bookmaker for many years. His business consisted of credit betting, ready-money betting, and street betting. In that year the company of A. B., Ld., was formed, and it had since carried on the ready-money betting. Similarly, since that year the credit bookmaking (which was on a large scale) had been carried on by another company which was also formed at the same time under the name of A., Ld. The street betting, however, continued to be carried on by A. B. personally, and was the only kind of betting carried on by him since 1926.

Everybody connected with the street betting business was liable to be fined, and a schedule showing some thirty-five convictions of A. B. and his employees in divers Courts of the Realm was put in evidence before the Commissioners.

At the same meeting of the Commissioners the company, A. B., Ld., also appealed against an assessment made on them under Sch. D in the sum of 25,000*l*. for the year ending April 5, 1932, as "turf commission agents." As stated above, the business carried on by the company was that of ready-money betting.

Much of both the street betting business of A. B. and the ready-money business of the company was concerned with betting on football matches.

The Special Commissioners stated that in previous cases which had been brought before them a lawful business had been mixed up with an unlawful one, and the Commissioners had not felt called on to disentangle from assessment so much as might be unlawful and criminal. The present cases, however, had been conducted on the footing that no part of the business done by either of the respondents was lawful betting and that their activities were criminal in the eye of the law. While it was not for them (the Commissioners) to comment on the effect of the non-enforcement of the laws relating to betting by the proper authorities, they did not consider that the Revenue could lawfully claim income tax on profits made as the result of that non-enforcement.

The Commissioners accordingly discharged the assessments and the Crown appealed.

Sir Thomas Inskip A.-G. and *R. P. Hills* for the Crown. The Commissioners were wrong. The fact that a trade is unlawful cannot be set up against a demand for income tax in respect of profits arising from it: per Denman J. in *Partridge* v. *Mallandaine* (1), who, according to the report in Tax Cases (2), went so far as to say that a person who systematically made profits as a receiver of stolen goods would be assessable to tax. It is true that in *Inland Revenue Commissioners* v. *Alexander von Glehn & Co., Ld.* (3), Scrutton L.J. expressed the view that he was "inclined to think, though he did not wish finally to decide it, that the Income Tax Acts are to be confined to lawful businesses, and to businesses carried on in a lawful manner," but his words were very guarded, and the Privy Council, after considering them in *Minister of Finance* v. *Smith* (4), said that they must not be taken to assent to any suggestion that the Income Tax Acts are necessarily restricted in their application to lawful businesses only. (5) In *Minister of Finance* v. *Smith* (4) it was held, on words in a Dominion Act which were not materially different from those of the Income Tax Act, 1918, Sch. D, that profit arising from illicit liquor traffic was liable to taxation. It is true that in *Hayes* v. *Duggan* (6) the Supreme Court of the Irish Free State held that profits derived from carrying out a sweepstake, being profits derived from a criminal enterprise, were not assessable to income tax, but in *Mann* v. *Nash* (7) Rowlatt J. fully considered that decision, criticized it, and refused to follow it. The principle

(1) (1886) 18 Q. B. D. 276, 278.
(2) (1886) 2 Tax Cas. 179, 181.
(3) [1920] 2 K. B. 553, 572.
(4) [1927] A. C. 193.
(5) Ibid. 198.
(6) [1929] I. R. 406.
(7) [1932] 1 K. B. 752.

underlying the decision in *Lindsay* v. *Commissioners of Inland Revenue* (1) is that where there is a trade its legality or illegality is immaterial in considering whether profits arising therefrom are assessable under Case I. of Sch. D. In that case Lord Morison said: "The burglar or the swindler who carries on a trade or business for profit is as liable to tax as an honest business man." (2) There is no justification for inserting the word "lawful" before "trade" in Sch. D, 1, (*a*), (ii). By s. 237 of the Income Tax Act, 1918, trade includes every trade, manufacture, adventure or concern in the nature of trade.

Latter K.C. and *Cyril King* for the respondents. The Commissioners were right. The cases relied on by the Crown are distinguishable from the present matter. In *Partridge* v. *Mallandaine* (3) the profits held to be chargeable to tax were not, as here, the result of illegal transactions. They were the result of transactions that were merely unenforceable in law. *Minister of Finance* v. *Smith* (4) was the case of Dominion legislation rendering chargeable profits arising from a source which was illegal in a particular Province, whereas here the legislation rendering the transactions illegal and that imposing the taxation have the same legislative authority. In *Mann* v. *Nash* (5) the illegal transactions formed only a part of the taxpayer's business, whereas here they form the whole of it. Moreover, the letting out of automatic machines, which was the trade in question in *Mann* v. *Nash* (5), was clearly a trade in the ordinary and natural sense of the word, while betting is not. "Trade" must mean the various commercial and productive enterprises which add to the wealth of the country. Illegal betting is a criminal undertaking resulting, not in trade, but in the unlawful transfer of money from one person to another which adds nothing to the resources of the country. Nor are gains from illegal transactions analogous to the other sources of income which are rendered

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(1) 1933 S. C. 33.

(2) Ibid. 43.

(3) 18 Q. B. D. 276.

(4) [1927] A. C. 193.

(5) [1932] 1 K. B. 752.

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chargeable by the Income Tax Acts. For the purposes of those Acts even an "adventure" must be a trading adventure: per Lord Macmillan in *Jones* v. *Leeming.* (1) *Lindsay* v. *Commissioners of Inland Revenue* (2) was clearly the case of a trading adventure and is distinguishable on that ground. The three senior judges made it clear that, in their opinion, the profits of crime are not assessable to tax. When an Act refers to "trade" the presumption is that it means lawful trade. It must be remembered that all profits do not fall within the scope of Sch. D: see per Blackburn J., in *Attorney-General* v. *Black.* (3) There would be practical difficulties, too, in assessing the profits of an illegal trade, as no allowances could be made in respect of the illegal expenses of the business.

FINLAY J. These two cases raise questions of much importance which, in view of the considerable difference of opinion which has been expressed by various judges before whom the questions involved have come, may also be regarded as being of some difficulty.

The question whether the conclusion arrived at by the Special Commissioners is right depends, in my opinion, simply on whether the facts of these cases show that there are "annual profits or gains arising or accruing . . . . (ii) to any person residing in the United Kingdom from any trade, profession, employment, or vocation" within Sch. D of the Income Tax Act, 1918. If once it is established that there is a "trade, profession, employment, or vocation," and that there are "profits or gains arising or accruing" therefrom, it follows that tax is leviable on those profits or gains, unless the taxpayer can bring himself within some special exception prescribed by the law.

I am relieved from making a detailed examination of most of the authorities by reason of the fact that in *Mann* v. *Nash* (4) Rowlatt J. discussed fully the authorities up to that date and, although the facts there were very different from those of the present cases, laid down principles which indubitably cover the present cases and make it quite clear that he would have decided them in favour of the Crown. I should not, in any event, have thought it right to depart from a judgment of Rowlatt J., expressed obviously with fullness and with care; but, with regard to the present matter, I agree with his judgment in *Mann* v. *Nash* (1) and prefer it to the view expressed by the Supreme Court of the Irish Free State in *Hayes* v. *Duggan* (2), a decision which I do not follow.

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(1) [1930] A. C. 415, 430.
(2) 1933 S. C. 33.
(3) (1871) L. R. 6 Ex. 308, 310.
(4) [1932] 1 K. B. 752.

The only authority which is later than *Mann* v. *Nash* (1) is *Lindsay* v. *Commissioners of Inland Revenue* (3), which supports the conclusion at which I have arrived. It is unnecessary to go into the facts of that case in detail, but, in substance, there was a "bootlegging" partnership to import whisky into the United States which involved breaches of the law both of this country and of the United States, and the question was whether the profits of that venture were chargeable to tax. The trade or adventure in which the taxpayers there were engaged was undoubtedly illegal, and it was held by the Court of Session that an assessment could properly be made on the profits. The Lord President (Lord Clyde) said (4): "Now, it is plain enough, I think, that the profits of crime could not be assessable to income tax as the profits of trade. If—to take an example—the mode of living followed by an individual consisted in nothing—or practically nothing—but the commission of the crime of resetting stolen goods, it might be difficult to say that the profits were assessable to income tax as the profits of 'trade' within the meaning of the Act of 1918. I am offering no opinion on the point; I am only saying that such a case would, in the unlikely event of its occurring, present the difficulty in an acute form. But, in the present case, the 'trade' did not consist in the commission of crime; it consisted in the marketing of a commercial article. The frauds on the customs authorities were only incidents of that 'trade.' Frauds are sometimes incidents of some 'trades', without exempting their profits from assessment to income tax." Lord Sands said (1): "I respectfully adopt the dictum of Lord Haldane in delivering the judgment of the Privy Council in the case of *Minister of Finance* v. *Smith* (2) that, once the character of a business has been ascertained as being of the nature of trade, the person who carries it on cannot found upon elements of illegality to avoid the tax." I, too, wish to adopt Lord Haldane's remarks in that case. Lord Morison's opinion was substantially the same as that of the other members of the Scottish Court. He said (3): "The burglar or the swindler who carries on a trade or business for profit is as liable to tax as an honest business man, and, in addition, he gets his deserts elsewhere."

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(1) [1932] 1 K. B. 752.
(2) [1929] I. R. 406.
(3) 1933 S. C. 33.
(4) Ibid. 40.

The extreme illustration of a burglar has been mentioned in argument before me. I express no opinion on a case which is quite unlike the present matters, but I would say that, assuming, as I am quite willing to assume, that a burglar and his occupation do not come within Sch. D of the Income Tax Act, 1918, the reason is that what he does is not earning profit by a "trade" within Case I. of the Schedule and not that, while carrying on a "trade" within Case I., he is taken out of the operation of the Case by some consideration of illegality. The view which I have expressed seems to be in accord with the observations of Viscount Haldane in *Minister of Finance* v. *Smith.* (2)

It is useless to pretend that the authorities are not inconsistent, but, as I have said, I propose to apply the principles laid down by Rowlatt J. in *Mann* v. *Nash.* (4) In their findings in the present cases the Commissioners have used the word "business," not "trade," but they clearly found that there was a systematic business being carried on, that profits were being derived from it, and that that business was a trade within Sch. D unless it was prevented from being so by reason of the fact that it was illegal. Mr. Latter

(1) 1933 S. C. 41.
(2) [1927] A. C. 193.
(3) 1933 S. C. 43.
(4) [1932] 1 K. B. 752.

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has referred to certain statutes and submitted that "trade" in those statutes must mean legal trade, but I do not think it necessary to have regard to any Act other than the Income Tax Act, 1918. In my view of the terms of Sch. D and the facts of these cases, there is by both the respondents the carrying on of a "trade" within the Schedule and "annual profits or gains arising or accruing" therefrom. Both these appeals must, therefore, be allowed.

Appeals allowed.

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for respondents: *C. Butcher & Simon Burns.*

G. F. L. B.

1932
May 25, 30.

OSLER (INSPECTOR OF TAXES) *v.* HALL AND COMPANY.

Revenue—Income Tax—Successive discontinuances of Trades—Notice that Tax shall be computed as if the Trade had been discontinued and a new Trade set up—Additional Assessment—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Cases I. and II., r.* 11—*Finance Act,* 1926 (16 & 17 *Geo.* 5, *c.* 22), *s.* 31, *sub-s.* 1 (*a*) (*b*); *s.* 32, *sub-s.* 1.

A change in the constitution of H. & Co. No. 1, a firm, took place in March, 1929, and H. & Co. No. 2 came into existence. No notice under r. 11 (1.) of the Rules applicable to Cases I. and II. of Sch. D, as amended by s. 32, sub-s. 1, of the Finance Act, 1926, that the tax should be computed as if the trade had been discontinued and a new trade set up, was given. In March, 1930, a change in the constitution of H. & Co. No. 2 took place, and H. & Co. No. 3 came into existence, and in this case due notice as above was given. The profits earned by H. & Co. No. 1 in the year ending April 5, 1928, were 50,000*l.*; for the year ending April 5, 1929, they earned 114,000*l.* The profits of H. & Co. No. 2 for the year ending April 5, 1930, were nil. H. & Co. No. 1 were assessed for the year ending April 5, 1929, in 50,000*l.* H. & Co. No. 2, by reason of the above notice, were assessed in the year ending April 5, 1930, on the profits of that year under s. 31, sub-s. 1 (*a*), of the Act of 1926—namely, nil—and not on 114,000*l.*, as would have been the case had the above notice not been given.

By s. 31, sub-s. 1 (*b*), of the Act of 1926: "If the profits . . . . of the year ending on April 5 in the year preceding the year of assessment in which the discontinuance [of the trade] occurs exceed the amount on which the person has been charged for that preceding year . . . . an additional assessment may be made upon him." Under that sub-section an additional assessment of 64,000*l.*, being the difference between 50,000*l.* and 114,000*l.*, was then made on H. & Co. No. 2 in respect of the year ending April 5, 1929 :—

Held, that H. & Co. No. 2 were not chargeable in the additional assessment, inasmuch as not they but H. & Co. No. 1 had "been charged" for that year within the meaning of the sub-section.

CASE stated by Commissioners for the Special Purposes of the Income Tax.

At a meeting of the said Commissioners on May 8, 1931, the respondents, Hall & Co. (called herein "Hall & Co. No. 2"), stock jobbers, appealed against an additional assessment to income tax in the sum of 64,185*l.* for the year ending April 5, 1929. From May, 1926, to March 21, 1929, the original firm (called herein "Hall & Co. No. 1") consisted of three partners, H. T. Holloway, H. C. Brown and H. C. L. Fisher. On March 21, 1929, H. C. Brown retired and a new partnership, Hall & Co. No. 2, was formed, consisting of H. T. Holloway, H. C. L. Fisher and L. J. Connor. Hall & Co. No. 2 carried on the business from March 22, 1929, to March 30, 1930. On March 21, 1930, H. Howell was admitted as a partner, and the firm (called herein "Hall & Co. No. 3") then consisted of the members of Hall & Co. No. 2 with H. Howell. Hall & Co. No. 3 had carried on the business since the said March 21, 1930.

When Hall & Co. No. 2 was formed no notice was given under the proviso to r. 11 (1.) of the Rules applicable to Cases I. and II. of Sch. D to the Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40) (1), as amended by s. 32 of the Finance

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(1) Finance Act, 1926 (16 & 17 Geo. 5, c. 22), s. 31, sub-s. 1: "Where in any year of assessment a trade, profession or vocation is permanently discontinued, then, notwithstanding anything in this Part of this Act—(*a*) the person charged or chargeable with tax in respect thereof shall be charged for that year on the amount of the profits or gains of the period beginning April 6 in that year and ending on the date of the discontinuance. . . . . (*b*) if the profits or gains of the year ending on April 5 in the year preceding the year of assessment in which the discontinuance occurs exceed the amount on which the person has been charged for that preceding year . . . . an additional assessment may be made upon him, so that he shall be charged for that preceding year on the amount of the profits or gains of the said year ending on April 5 . . . ."

Sect. 32, sub-s. 1: "For rule 11 of the Rules applicable to Cases I.

Act, 1926. When Hall & Co. No. 3 was formed such notice was given.

For the year ending March 21, 1928, the profits of Hall & Co. No. 1 were 50,495*l.*, and for the year ending April 5, 1929, an assessment on that sum was made on Hall & Co. No. 1. No adjustment of this assessment under r. 9 (2.) of the Rules applicable to Cases I. and II. of Sch. D was made in respect of the fifteen days from March 22, 1929, to April 5, 1929, during which Hall & Co. No. 2 were carrying on the business.

For the year ending March 21, 1929, the profits of Hall & Co. No. 1 amounted to 114,680*l.*, but the assessment for the year ending April 5, 1929, on Hall & Co. No. 1 was only in the sum of 50,495*l.*, as above stated.

For the year ending March 20, 1930, the profits of Hall & Co. No. 2 were nil. The assessment for the year ending April 5, 1930, on Hall & Co. No. 2 would have been 114,680*l.* if the notice had not been given under the proviso to the amended r. 11 (1.) of the Rules applicable to Cases I. and II. of

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and II. of Schedule D there shall be substituted the following:—

11 (1.) If at any time after April 5, 1928, a change occurs in a partnership of persons engaged in any trade, profession or vocation, by reason of retirement or death, or the dissolution of the partnership as to one or more of the partners, or the admission of a new partner, in such circumstances that one or more of the persons who until that time were engaged in the trade, profession or vocation continue to be engaged therein . . . . the tax payable by the person or persons who carry on the trade, profession or vocation after that time shall, notwithstanding the change, be computed according to the profits or gains of the trade, profession or vocation during the period prescribed by the Income Tax Acts:

Provided that, where all the persons who were engaged in the trade, profession or vocation both immediately before and immediately after the change require, by notice signed by all of them . . . . and sent to the surveyor within three months after the change took place, that the tax payable for all years of assessment shall be computed as if the trade, profession or vocation had been discontinued at the date of the change, and a new trade, profession or vocation had been then set up or commenced, and that the tax so computed for any year shall be charged on and paid by such of them as would have been charged if such discontinuance and setting up or commencement had actually taken place, the tax shall be computed, charged, collected and paid accordingly."

Sch. D. (1) But as such notice was given, as stated above, the assessment on Hall & Co. No. 2 for the year ending April 5, 1930, was required by virtue of s. 31, sub-s. 1 (*a*), of the Finance Act, 1926 (1), to be on the amount of the profits or gains of the year ending March 20, 1930, which as already stated was nil, and no charge to tax was made on Hall & Co. No. 2 for that year.

As a further consequence of such notice having been given, the additional assessment for the year ending April 5, 1929, in the sum of 64,185*l.*, now under appeal, was made on Hall & Co. No. 2 under s. 31, sub-s. 1 (*b*), of the Act of 1926, pursuant to the said proviso to the said amended r. 11 (1.). That sum was the amount by which the profits of the business for the year ending March 21, 1929 (which was treated as attributable to the year ending April 5, 1929)—namely, 114,680*l.*, exceeded the amount of the assessment on Hall & Co. No. 1 for the year ending April 5, 1929—namely, 50,495*l.*

It was contended (inter alia) on behalf of the respondents that as they never were charged for the year ending April 5, 1929, the provisions of s. 31, sub-s. 1 (*b*) (1), of the Finance Act, 1926, did not apply.

The Commissioners upheld this contention and discharged the assessment, and the inspector of taxes appealed.

Sir Thomas Inskip A.-G. and *R. P. Hills* for the appellant.

J. M. Tucker K.C. and *T. N. Donovan* for the respondents.

Cur. adv. vult.

1932. May 30. FINLAY J. I think that this case can be decided on a very simple and short point of construction. The facts are clearly set out in the case stated by the Commissioners. They relate to the business carried on by and assessments made on a series of firms who were carrying on business as stock jobbers. The facts as the Commissioners found them were these. From May, 1926, to March 21, 1929, a firm we have agreed to call Hall & Co. No. 1, which consisted of three partners, Holloway, Brown and Fisher, carried on business as stock jobbers. On March 21, 1929, Brown retired. Thereupon there was a new partnership, which consisted of two of the old partners, Holloway and Fisher, and a new partner, L. J. Connor. That partnership continued to trade under the same name, and it was called during the argument Hall & Co. No. 2, and it is—and this is an important point—that firm which has been assessed in this case. They carried on business for almost exactly a year from March 22, 1929, to March 20, 1930. On March 31, 1930, a new partner, a gentleman called Howell, was admitted, and thereupon Hall & Co. No. 3 came into existence, consisting of four partners, Holloway, Connor, Fisher and Howell, and Hall & Co. No. 3 have carried on business since March 21, 1930.

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(1) See note (1) ante, pp. 721, 722.

Now a circumstance in the case which requires to be noticed is this, that when Hall & Co. No. 2 was formed no notice was given under the proviso to r. 11 (1.) of the Rules applicable to Cases I. and II. of Sch. D, as amended by s. 32, sub-s. 1, of the Finance Act, 1926. (1) I shall call attention to that section in a moment. But when Hall & Co. No. 3 was formed due notice was given under that proviso. With regard to the profits, the position is this: In the year ending March 21, 1928, Hall & Co. No. 1 made 50,000*l*. odd, and they were assessed in that sum for the year ending April 5, 1929. It will have been observed that there was a period of fifteen days during which Hall & Co. No. 1 were not carrying on business and Hall & Co. No. 2 were, but no adjustment was made, and, no doubt, no adjustment was considered necessary in respect of that period. Now for the year ending March 21, 1929, the profits of Hall & Co. No. 1 amounted to 114,680*l*., but the assessment was of course only on the profits of the previous year. For the year ending March 20, 1930, Hall & Co. No. 2 made no profits; they would, in the ordinary course, have been assessed on the previous year's profits, 114,000*l*. odd, but that was properly and legitimately prevented by the giving of the notice under the amended r. 11. Thereupon, of course, the assessment on Hall & Co. No. 2 was required to be on the actual profit of the year and that, as I have already said, was nil. Now, the notice in respect of the change from Hall & Co. No. 2 to Hall & Co. No. 3 having been made, an additional assessment for the year ending April 5, 1929, in the sum of 64,185*l.* was made upon Hall & Co. No. 2, and that, of course, represents the amount by which the profits of the business for the year ending March 21, 1929, exceeded the amount of the assessment which had been made, be it noted, not upon Hall & Co. No. 2 but upon Hall & Co. No. 1 for the year ending April 5, 1929.

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(1) See note (1) ante, pp. 721, 722.

In those circumstances there was an appeal against the assessment, and after some discussion before the Special Commissioners it was apparently ascertained that the appellants, the persons assessed, and therefore the persons appealing, were Hall & Co. No. 2. Hall & Co. No. 2, having appealed, argued that the assessment was bad in law, and the broad ground of their contention was, that inasmuch as Hall & Co. No. 2 never had been charged for the year ending April 5, 1929, the provisions of s. 31, sub-s. 1 (*b*), of the Act of 1926 (1), did not apply and, therefore, no assessment under that provision could be made upon them. The Special Commissioners, following, as they mentioned, some previous decisions of their own, were of opinion that that broad contention of the present respondents was right, and I am of opinion that the Special Commissioners arrived at the correct conclusion.

The matter can, I think, be decided upon an extremely short point of construction. The old r. 11 of the Income Tax Act, 1918, has been replaced by s. 32 of the Act of 1926, which substitutes for the old r. 11 the following: [His Lordship read it. (1)] The notice having been given on the second occasion, though not on the first occasion, s. 31 was brought into operation. [His Lordship read it. (1)]

Now I do not think it will be useful to speculate as to what the Legislature ought to have done or might have done if the sort of case which here arises had been before them. The Attorney-General suggested that this is a casus omissus. Mr. Tucker—and it was only fair to let him pursue the same line of argument—pointed out, and it seemed to me a point of force in his argument, that while it was quite possible that some provision for some tax ought to have been made in the peculiar circumstances which arise, a real injustice might be done if this section were applied in the circumstances of this case, for it is of course obvious that here were different firms. Hall & Co. No. 1, Hall & Co. No. 2, and Hall & Co. No. 3 were composed to a substantial extent of different people, and a real injustice might be done if a liability were imposed upon one of those firms in respect of a period in which they were not entitled to the profits of that period and were therefore not, one would think, bound to bear the liability. But, although I mention that matter, I think this can be decided upon an extremely short point of construction, arising upon s. 31, sub-s. 1 (*b*). (1) That sub-section says that if the profits or gains "exceed the amount on which the person has been charged for that preceding year . . . . an additional assessment may be made upon him." Now it seems to me—and the words "additional assessment" and the whole structure of the section show it—that the thing manifestly contemplated is an assessment upon a person, that assessment being by reason of subsequent events inadequate and, therefore, an additional assessment being made upon that person. The Attorney-General invited me to read in the words "or chargeable," and there were additional words which he ultimately said he wanted if he was to succeed. I do not see any reason for reading in the words "or chargeable" or any other words. It seems to me that it is obvious that what the Legislature is dealing with is the simple case, the usual case, no doubt, where a person has been charged and then, in the light of subsequent events, it is proper to make an additional charge upon that person. But the whole basis

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(1) See note (1) ante, pp. 721, 722.

(1) See note (1) ante, pp. 721, 722.

of the thing must, as I think, be the existence of a charge upon the person upon whom it is now proposed to levy an additional assessment. If that is right, the whole basis of the Crown's case fails, and fails because Hall & Co. No. 2 never were in fact charged for this year of assessment. All that can be said is that Hall & Co. No. 1 having been charged, an adjustment might have been made in respect of a period of fourteen days. That adjustment never was made and I think it can be ignored. Here the substance of the thing clearly is this: that not Hall & Co. No. 2 but Hall & Co. No. 1 were carrying on the business in the year in question, and they were the people who were assessed, that is to say, they were the persons who had "been charged." One cannot, as I think, have a charge upon one firm, Hall & Co. No. 1, and then an additional assessment levied upon another firm, Hall & Co. No. 2.

That is a perfectly simple ground and it is, if I rightly follow it, exactly the ground upon which the Special Commissioners decided the case. Various other matters were gone into, and there was considerable argument before me as to the construction of s. 31, sub-s. 1 (*a*), of the Act of 1926. (1) Into that, I think, it is unnecessary for me to go. It is enough to say that in my opinion the view which was taken by the Special Commissioners was correct, and on that ground and on the construction of s. 31, sub-s. 1 (*b*), which I have indicated, I decide this case in favour of the respondents. The appeal will accordingly be dismissed.

Appeal dismissed.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Martyns & Gane.*

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(1) See note (1) ante, pp. 721, 722.

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NEUMANN *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Surtax—Dividend—Company—Rents from Properties in excess of Sch. A Assessment—Accumulation of Surplus Rents to answer additional Claim to Income Tax—Distribution of Accumulations as additional Dividend on failure of Claim—Liability of Shareholder to Surtax on his additional Dividend—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 20*—Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 38 *—Finance Act,* 1931 (21 *&* 22 *Geo.* 5, *c.* 28), *s.* 7.

On April 4, 1930, a shareholder received an additional dividend amounting to 4275*l.* out of a sum reserved by the company to answer a possible claim for income tax in respect of rents on property in the City of London. These rents had greatly exceeded the amount on which the company was assessed to income tax under Sch. A in respect of the property. The Crown had claimed a further tax on the ground that the company was carrying on a trade and that the excess of rents was assessable to tax under Sch. D. The House of Lords decided against that claim: *Fry* v. *Salisbury House Estate, Ld.* [1930] A. C. 432; and the company then distributed the reserve by way of additional dividend. The shareholder had originally included in his return for surtax the sum of 5343*l.* 15*s.*, being the gross sum which after deduction of income tax at 4*s.* in the £ would leave 4275*l.* As a result of the subsequent decision in *Gimson* v. *Inland Revenue Commissioners* [1930] 2 K. B. 246 the shareholder appealed against the assessment to surtax made on him on this footing, and claimed not to be assessable to surtax on either the sum of 5343*l.* 15*s.* or the lesser sum of 4275*l.* The Special Commissioners confirmed the assessment:—

Held, by the Court of Appeal (reversing Finlay J.'s decision), that the shareholder was assessable to surtax in respect of this additional dividend in the sum of 4275*l.* as part of his total income. It was immaterial in determining the shareholder's liability to surtax whether or not the dividend was paid out of a fund not chargeable to tax in the hands of the company. But, in fact, the company in paying tax under Sch. A on the annual values of the properties out of which the rents accrued to the company had paid tax in respect of those rents as measured under Sch. A. There was, however, no ground for assessing the shareholder to surtax on the footing of his having received a larger sum than 4275*l.*

Rule 20 of the All Schedules Rules, as amended by s. 7 of the Finance Act, 1931, discussed and explained.

Gimson v. *Inland Revenue Commissioners* [1930] 2 K. B. 246; 15 Tax Cas. 595 discussed and disapproved.

APPEAL from a decision of Finlay J. on a Case stated by the Commissioners for the Special Purposes of the Income

Tax Acts, under the Finance Act, 1927, s. 42, sub-s. 7, and the Income Tax Act, 1918, s. 149.

At a meeting of the Commissioners held on October 21, 1931, Ludwig Neumann appealed against an assessment to surtax made upon him for the year 1929–30.

On the basis of a letter dated April 4, 1930, from Salisbury House Estate, Ld. (hereinafter called "the company"), Mr. Neumann included in his return for the purposes of this assessment an item of 5343*l.* 15*s.* which, according to the letter, was the gross amount applicable to a net interim dividend of 4275*l.* received by him from the company in 1929–30. The assessment, as made upon him, included that sum of 5343*l.* 15*s.* Later, Mr. Neumann was informed by the company that the sum of 4275*l.* had been erroneously described by the company as a dividend of 5 per cent., free of tax, and that in fact it represented a sum, distributed out of the untaxed income of the company, which should not have been included in any surtax return made by him. By a letter dated October 1, 1930, Mr. Neumann informed the clerk to the Special Commissioners that he had been notified that the dividend should not have been returned, that the company informed him that it was in communication with the Board of Inland Revenue on the matter, and that, in the meantime, he gave notice of appeal against the assessment.

The company had year by year paid ordinary annual dividends to its shareholders (including Mr. Neumann), and in the year 1929–30 the company declared such a dividend (in addition to making the interim distribution which was the subject of dispute in this case) upon which no question arose in this appeal, it being admitted for the purposes of this appeal that the proportional part thereof, to which Mr. Neumann was entitled, was rightly included in the assessment. The only question for the opinion of the Court was whether the item of 5343*l.* 15*s.* (or any part of it) was properly included in computing the assessment.

The company owned a property in the City of London, the rents from which greatly exceeded the amount on which the company was assessed to income tax Sch. A in respect of the property. For several years and at all times material to this appeal, both (*a*) the profits of the company available for dividend, and (*b*) the ordinary annual dividends of the company had been greater than the amount on which income tax had been paid by the company. It had been contended on behalf of the Crown that the company was carrying on a trade and that in computing its profits for the purposes of assessment under Sch. D it was necessary to take into account all its receipts, including receipts from rents, an allowance being made for the amount of the assessment under Sch. A. Assessments under Sch. D were made upon the company upon this basis, against which the company appealed. It was held by the House of Lords on April 4, 1930, that the company was not so assessable and that liability to tax in respect of the rents was covered by the Sch. A assessments, and the rents could not be brought into computation of any liability under Sch. D: *Fry* v. *Salisbury House Estate, Ld.* (1)

While that litigation was pending the company had put aside 18,325*l.* out of its profits to the credit of an income tax reserve. The decision of the House of Lords in favour of the company rendered that reserve no longer necessary, and the company at once, on April 4, 1930, declared and paid thereout a further dividend described at the time as an "interim dividend of 5 per cent. free of tax." It was not disputed that this sum was paid out of a surplus of accumulated rents which remained in the hands of the company after profits had been distributed to the amount of any assessments made on the company.

As a result of this declaration of dividend Mr. Neumann received a cheque for 4275*l.*, together with a letter from the company dated April 4, 1930, in the following terms:—

"Dear Sir,—I hand you herewith cheque for 4275*l.* 0*s.* 0*d.* in respect of an interim dividend for the year ending December 25, 1930, of 5 per cent., free of tax, on the 85,500 shares registered in your name.

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(1) [1930] A. C. 432; 15 Tax Cas. 266.

	£	*s.*	*d.*
This dividend is equivalent to a gross amount of	5343	15	0
Less income tax at 4*s.* in the £ . .	1068	15	0
	£4275	0	0"

There followed a certificate in the usual form as to deduction and payment of income tax.

On May 9, 1930, the case of *Gimson* v. *Inland Revenue Commissioners* (1) was decided in the King's Bench Division, and in consequence of that decision the company came to the conclusion that the terms of its directors' resolution and of its letter to shareholders of April 4, 1930, were wrong. After correspondence between the company and the Commissioners of Inland Revenue, in which the company vainly tried to persuade the Commissioners of Inland Revenue that the dividend in question fell within the authority of *Gimson's* case (1), and was not income liable to surtax in the hands of its shareholders, the company (which had previously informed its shareholders as to the attitude it was adopting in its correspondence with the Inland Revenue) sent to its shareholders, including Mr. Neumann, a letter dated February 28, 1931, of which the material part was as follows :—

"Dear Sir,—With reference to my letter of April 4, 1930, enclosing a cheque in respect of an interim dividend for the year ending December 25, 1930, described as of an amount of 5 per cent. free of tax, I have to inform you, in conformity with the opinion of the company's legal advisers, that the dividend should have been described as a dividend of 5 per cent. actual, being a distribution of untaxed income, and that this income not having been taxable in the hands of the company is not taxable in your hands and should therefore not be included in any income tax or surtax returns made or to be made by you. Such returns should include only what is 'income' for income tax purposes. The certificate at the foot of the letter of April 4, 1930, is hereby withdrawn and should accordingly be ignored by you, and in place of

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(1) [1930] 2 K. B. 246 ; 15 Tax Cas. 595.

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the gross amount of the dividend as stated in the letter the following should be substituted, in order to comply with s. 33 of the Finance Act, 1924 (if applicable)—namely :—

	£	s.	d.
Gross amount of dividend . . .	4275	0	0
Rate and amount of income tax appropriate thereto	Nil		
Net dividend . . .	£4275	0	0

At the same time I have to inform you that the Board of Inland Revenue do not concur in this opinion."

It was contended by counsel for Mr. Neumann (inter alia) (*a*) that since surtax was an additional duty of income tax, no liability to surtax could exist in respect of the dividend in question, unless the sum in question was liable to income tax in the hands of the company, and that the company in fact made the payment out of moneys not liable to income tax ; (*b*) that rents as such were not liable to income tax, but the liability to income tax was in respect of annual value only, and that the dividend in question was made by the company out of a surplus of accumulated rents which were available after distributing profits year by year to the full amount of the annual value on which the company was assessable ; (*c*) that the decision in *Gimson* v. *Inland Revenue Commissioners* (1) was applicable, and that the case of *Hamilton* v. *Inland Revenue Commissioners* (2) was distinguishable ; (*d*) that, in any case, the matter was concluded in favour of Mr. Neumann by s. 7 of the Finance Act, 1931, which was retrospective ; (*e*) that in construing s. 7 of the Finance Act, 1931, regard should be had to rr. 19 and 21 respectively of the All Schedules Rules, Income Tax Act, 1918, and to the decisions in *Attorney-General* v. *Metropolitan Water Board* (3) and the *Luipaard's Vlei Estate* case (4); (*f*) that the dividend should not be included in a computation of

(1) [1930] 2 K. B. 246; 15 Tax Cas. 595.

(2) [1931] 2 K. B. 495.

(3) [1928] 1 K. B. 833; 13 Tax Cas. 294.

(4) [1930] 1 K. B. 593; 15 Tax Cas. 573.

Mr. Neumann's total income for the purposes of surtax 1929–30.

For the Crown it was contended—(*a*) that the income of the company as represented by rents had been assessed to income tax under Sch. A of the Income Tax Act, 1918, the difference between the amount of the rents and the amount of the assessment being due to the measure applied under the said Schedule and the Valuation (Metropolis) Act, 1869, in ascertaining the amount of the assessment; (*b*) that the said dividend had been paid out of the said income; (*c*) that the said dividend was a dividend to which s. 7 of the Finance Act, 1931, applied; (*d*) that the company on paying the said dividend had deducted tax at the standard rate on the gross amount of the dividend paid; (*e*) that the gross amount of the said dividend had been properly included in the surtax return and assessment, and that the assessment should be confirmed; (*f*) that the case was concluded by the decision in *Hamilton* v. *Inland Revenue Commissioners* (1); (*g*) that the case of *Gimson* v. *Inland Revenue Commissioners* (2) was distinguishable.

The following cases were referred to: *Fry* v. *Salisbury House Estate, Ld.* (3); *Gimson* v. *Inland Revenue Commissioners* (2); *Rossdale* v. *Fryer* (4); *Inland Revenue Commissioners* v. *Lady Miller* (5); *Hamilton* v. *Inland Revenue Commissioners* (1); *Attorney-General* v. *Metropolitan Water Board* (6); *Luipaard's Vlei Estate and Gold Mining Co.* v. *Inland Revenue Commissioners* (7); *London County Council* v. *Attorney-General.* (8)]

The Commissioners held that the dividend in question formed part of Mr. Neumann's total income for the purposes of surtax for the year 1929–30 and confirmed the assessment.

(1) [1931] 2 K. B. 495.

(2) [1930] 2 K. B. 246; 15 Tax Cas. 595.

(3) [1930] A. C. 432; 15 Tax Cas. 266.

(4) [1922] 2 K. B. 303.

(5) [1930] A. C. 222; 15 Tax Cas. 25.

(6) [1928] 1 K. B. 833; 13 Tax Cas. 294.

(7) [1930] 1 K. B. 593; 15 Tax Cas. 573.

(8) [1901] A. C. 26; 4 Tax Cas. 265.

Finlay J. said that the matter depended on r. 20 of the All Schedules Rules as amended by s. 7 of the Finance Act, 1931. It seemed to him that in the light of that rule the distribution of accumulated rents was not made out of profits and gains charged to tax. It followed that the company not having borne income tax could not pass on tax to the shareholders. For that reason he was not liable to tax by deduction, and it could not, he thought, be suggested that he was liable to income tax by direct assessment. The fund might be compared with the fund produced by sales of land in *Hudson's Bay Co.* v. *Stevens.* (1) In that case it was held that the fund produced by the sale of land was not profits of the trade and not liable to taxation. He apprehended that in that case it would be quite clear that the sum distributed would not be liable to any taxation either by way of income tax or surtax in the hand of the recipient. The cases were not analogous, but the principle seemed to be the same here.

If it were true that this sum was not liable to income tax, could it be liable to the additional duty of income tax called surtax ? It seemed to him that it could not be so liable, for the reason that this additional tax was levied on what might be conveniently called "income tax income" and that it was impossible to go outside the ambit of income liable to income tax and to bring in that which was not liable to income tax. The reasoning of Rowlatt J. in *Gimson's* case (2) supported this view.

The judgments in *Hamilton* v. *Inland Revenue Commissioners* (3) did not seem to him to touch the present case at all. The point there decided was a different point, and he did not think that, carefully considered, that case directly at all events bore upon the present case.

The case was a peculiar one and not directly covered by any authority. It was necessary therefore to consider the matter on principle. He had done so with the result that he had, with some difficulty and doubts, arrived at a view differing from that which recommended itself to the Special Commissioners. The appeal must be allowed.

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(1) (1909) 5 Tax Cas. 424.

(2) [1930] 2 K. B. 246; 15 Tax Cas. 595.

(3) [1931] 2 K. B. 495.

The Crown appealed. The appeal was heard on December 13 and 14, 1932, and judgment given on January 19, 1933.

Sir Thomas Inskip A.-G. and *R. P. Hills* for the Crown.

A. M. Latter K.C. and *J. H. Bowe* for the respondent.

1933. Jan. 19. The following written judgments were delivered :—

LORD HANWORTH M.R. On April 4, 1930, the respondent to this appeal was sent a cheque for 4275*l.* by the Salisbury Hotel Estate Company, Ld., as the quota due to him out of a sum reserved by the company to meet a possible liability which might have fallen upon them if the House of Lords had reversed the decision of this Court reported as *Salisbury House Estate, Ld.* v. *Fry.* (1) The decision was that day affirmed. (2)

When sending this sum to the respondent the company wrote treating it as a sum from which tax had been deducted, and if tax at the appropriate rate—namely, 4*s.*, had been taken from it, the gross amount of the respondent's quota would have been 4275*l.* plus 1068*l.* 15*s.*, equal to a total of 5343*l.* 15*s.*

On May 9, 1930, the case of *Gimson* v. *Inland Revenue Commissioners* (3) was decided by Rowlatt J., when he held that where no payment of income tax had been made upon, or deducted from, the sum paid over to the shareholder, no charge for surtax could be made upon it. Thereupon the directors amended the note accompanying the payment of the 4275*l.* and explained that there was no income tax appropriate to it, and therefore that it was a net sum receivable by the shareholder, the present respondent.

In accordance with the terms of the letter of April 4, 1930, the respondent included in his return the larger sum of

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(1) [1930] 1 K. B. 304.
(2) [1930] A. C. 432.
(3) [1930] 2 K. B. 246.

5343*l.* 15*s.*, and he was duly assessed upon it to surtax. Afterwards, upon the decision of *Gimson* v. *Inland Revenue Commissioners* (1) becoming known, he claimed that surtax was not payable upon either the sum of 5343*l.* 15*s.* or 4275*l.*, and he appealed against the assessment made upon him. The Commissioners for the Special Purposes of the Income Tax Acts heard the appeal and confirmed the assessment. From that decision the respondent appealed to Finlay J., who reversed the decision of the Commissioners and discharged the assessment. The Crown now appeal to this Court, and the question to be decided is whether the respondent is liable to pay surtax, either on the 4275*l.* actually received, or on the larger sum of 5343*l.* 15*s.*, as being the sum reached if the amount paid over is to be treated as having borne income tax.

In view of the fact that the respondent has received 4275*l.*, it will be convenient to state the grounds on which he claims, and the learned judge has held, that he is entitled to immunity in respect of it from surtax. It is argued that the 4275*l.* was not paid out of profits and gains charged to income tax, and that no surtax can be charged on sums in respect of which no income tax has been paid. The learned judge held that "it is a distribution which is not made out of profits and gains which are charged to tax. It follows, of course, that the company not having borne tax—and in my opinion they have not borne tax on these sums—cannot pass on tax not borne by themselves to the shareholders. Manifestly the shareholders cannot be made to bear a share of that tax which the company have not borne and are not liable to bear."

This statement appears to me to overlook certain principles of income tax law which are not in doubt. For income tax purposes, the company and a shareholder are separate entities. No doubt for the purposes of collection, the system of deduction at the source has been long established and maintained. But the relations of the company and of the shareholder to the Inland Revenue are separate and distinct.

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(1) [1930] 2 K. B. 246.

A shareholder may have quite independent rights as against the Crown; both in the matter of his liability at all and of certain deductions to be made from his liability which are appropriate to him alone.

There is no agency on the part of the company as between it and the shareholder; see per Lord Cave in *Inland Revenue Commissioners* v. *Blott* (1), where he says: "a company paying income tax on its profits does not pay it as agent for its shareholders. It pays it as a tax payer, ... But no agency, properly so called, is involved." The company pays tax on the full amount of its profits or gains "before any dividend thereof is made," and the amount deducted from any dividend paid over to a shareholder is the amount at the standard rate on the gross amount of the dividend so paid over and not a proportionate part of the tax paid by the company: see *Hamilton* v. *Inland Revenue Commissioners* (2) and also *Inland Revenue Commissioners* v. *Dalgety & Co., Ld.* (3)

Next, I do not think that it is right to treat the corpus of 18,325*l.*—the "surplus of accumulated rents which remained in the hands of the company" (see para. 5 of the Case)—as moneys which were not liable to income tax. The surplus remained from the profit rents charged by the Salisbury House Company, and the company paid income tax under Sch. A on the annual value of the properties out of which those profits accrued to the company. The measurement was under Sch. A, but the tax, whether under one Schedule or another, is a tax charged in respect of all property, profits or gains respectively described or comprised in the Schedules marked A, B, C, D and E: see s. 1 of the Act of 1918. "It is one tax, not a collection of taxes essentially distinct," measured "differently under each Schedule": see per Lord Macnaghten in *London County Council* v. *Attorney-General*. (4) If the rents had not paid tax according to the appropriate measure, they would have been caught under Case VI. of Sch. D, which charges tax "in respect of any

(1) [1921] 2 A. C. 171, 201.
(2) [1931] 2 K. B. 495.
(3) [1930] 1 K. B. 1, 25, 26.
(4) [1901] A. C. 26, 35, 36.

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annual profits or gains not falling under any of the foregoing cases, and not charged by virtue of any other Schedule." This is made clear by the speeches in the case of *Fry* v. *Salisbury House Estate, Ld.* (1), of Lord Dunedin, who said (2): "The income of the respondents, as represented by rents, is admittedly assessed, and properly assessed under Schedule A"; and of Lord Warrington, who said (3): "Now the effect of the Crown's contention if it be correct would be indirectly to convert this tax on annual value to a tax on rents." The passage quoted from the judgment of Scrutton L.J. in *Rossdale* v. *Fryer* (4) is not contrary to the above, for he makes it clear (5) "that the tax on land is not according to the actual receipts but the assessment, ... the actual rent, is not a sum on which the landlord can be taxed; .... Schedule A only relates to the tax on assessment, and not on actual rent."

When profits and gains were estimated on a three years' average, the measure of the average may have in any year differed from the receipts of the year of assessment. In the present case there is no question but that 4275*l.* was received by the respondent in the year in question. He had to return his total income, and by s. 38, sub-s. 1 (*b*), of the Finance Act, 1927, pay surtax upon the amount of it which is in excess of a certain limit. The expression "total income" in relation to any person is defined by sub-s. 2 to mean "the total income of that person from all sources estimated, as the case may be, either in accordance with the provisions of the Income Tax Acts as they apply to income tax chargeable at the standard rate or in accordance with those provisions as they apply to surtax."

In my opinion the respondent's "total income" estimated upon either of these alternatives must include this 4275*l.* received by him. He must estimate his own income received by him, and upon that basis the decision of the Commissioners was right and must be restored.

(1) [1930] A. C. 432.
(2) Ibid. 440.
(3) [1930] A. C. 450.
(4) [1922] 2 K. B. 303.
(5) Ibid. 313.

In *Gimson's* case (1) the sum of 35*l.* was received by the subject, and was an amount paid on the division of a sum in respect of which income tax had not, owing to the principles of admeasurement, been payable or paid. Rowlatt J. explains (see *Hamilton* v. *Inland Revenue Commissioners* (2)) that the decision had no reference to such a question as was under consideration in *Hamilton's* case (2) and is under consideration here—namely, whether the entity of the shareholder and company must be considered separately. But in my judgment Rowlatt J. applied a wrong test in *Gimson's* case. (1) The liability to surtax does not depend upon, and cannot be resolved only by, ascertaining whether income tax has been paid on an item claimed to be included in a surtax return, and if it has not paid income tax, then the item is to fall out of the surtax return. That principle is contrary to the terms of s. 38, sub-ss. 1 and 2, already referred to. Nor do I find any authority for it in what was said by Lord Sands in *Lady Miller's* case (3) and approved by Lord Warrington (4), with which we were pressed in argument. It must be remembered that what was under consideration in that case was whether the enjoyment of certain premises by a tenant for life could be estimated and brought into account for the purpose of her assessment to super-tax; and it was held that the life tenant was properly assessed upon a sum which included both the assessments of the mansion house and grounds under Schs. A and B, and the amounts of the payments for rates upon the premises made by the trustees of the settlement.

The truth is that confusion is introduced into a case like *Gimson's* (1), or the present, by too great attention being paid to the mode of collection by deduction, under rr. 19 and 21, and r. 20, as now to be interpreted by s. 7, sub-ss. 1 and 2, of the Finance Act, 1931. The cases of the *Metropolitan Water Board* (5) and of *Luipaard's Vlei Estate and*

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(1) [1930] 2 K. B. 246.
(2) [1931] 2 K. B. 495, 504.
(3) 15 Tax Cas. 25, 60.
(4) [1930] A. C. 222, 238; 15 Tax Cas. 25, 84.
(5) [1928] 1 K. B. 833.

Gold Mining Co. (1) illustrate the difficulties that arise in construing and applying rr. 19, 20 and 21. I agree with the examination of the former case to which Romer L.J. has in his judgment subjected it, and it does not seem to me to be necessary to examine it further. Sect. 7, sub-s. 1, was passed to avoid any danger to the Revenue such as was suggested in the *Metropolitan Water Board* case (2), and I hold that the sum of 18,325*l.* here had not been deemed immune from income tax. Though not directly charged, as it would have been if it had been a profit made within the ambit of Sch. D, nevertheless it belonged to, and arose from, a source which had suffered its appropriate charge to tax under Sch. A.

The fact that no deduction was made from the sum paid over to the respondent, but that the 4275*l.* was the quota due to him upon a direct and simple division of the corpus arising from the accumulated rents renders s. 7, sub-ss. 1 and 2, inapplicable. The deduction that is "authorized" under sub-s. 1 was not exercised, and it is not necessary to consider whether it could have been exercised. Equally there is no occasion to alter the figure actually received into another under s. 7, sub-s. 2. The sum paid was 4275*l.* simpliciter, and is not to be "deemed to represent" another amount.

For these reasons, in my judgment the appeal should be allowed with costs here and below, and an assessment made upon the respondent in the sum of 4275*l.*

SLESSER L.J. On April 4, 1930, the directors of the Salisbury House Estate, Ld., carried the following resolution: "Income Tax Appeal. It was reported that the Crown's appeal to the House of Lords against the judgment of the Court of Appeal had been dismissed. Interim Dividend. As a result of the above it was resolved that an interim dividend of 5 per cent. free of tax on account of the year ending 25th December, 1930, be declared payable to-day."

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(1) [1930] 1 K. B. 593.

(2) [1928] 1 K. B. 833.

On the same day they sent Mr. Neumann a cheque for 4275*l.*, stated to be as follows: "This dividend is equivalent to a

gross amount of	£5343 15 0
less income tax at 4*s.* in the £ . .	1068 15 0
	£4275 0 0"

This dividend was the respondent's share of an income tax reserve of the company of 18,325*l.*, which they had held back in case they might have been called upon to pay more income tax had the House of Lords decided in favour of the contention of the Crown that the company were liable to be assessed on their rents received to be regarded as profits and gains under Sch. D. In fact the company succeeded, and the House of Lords affirmed the decision of this Court that the rents of the company were profits arising from the ownership of land in respect of which the assessment under Sch. A was exhaustive, so that the reserve of 18,325*l.* became distributable as part of a surplus of accumulated funds or rents. In these circumstances, the respondent included in his return for assessment for surtax for 1929–30 the sum of 5343*l.* 15*s.*

On February 28, 1931, the company wrote to the respondent saying that "the dividend should have been described as a dividend of 5 per cent. actual, being a distribution of untaxed income and that this income, not having been taxable in the hands of the company is not taxable in your hands and should, therefore, not be included in any income tax or surtax returns made or to be made by you." They accordingly substituted for the statement of dividend above mentioned the following:—

	£	*s.*	*d.*
"Gross amount of dividend . . .	4275	0	0
Rate and amount of income tax appropriate thereto	Nil		
Net dividend	£4275	0	0"

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The Crown, nevertheless, claimed that the whole sum of 5343*l*. 15*s*. or, alternatively, that the sum of 4275*l*., formed part of the respondent's total income for the purposes of surtax, and the Commissioners confirmed the assessment as originally made for the full amount.

The respondent appealed, and Finlay J. allowed the appeal as to the whole sum. From his decision, appeal has been brought by the Crown to this Court.

In the first place, it is said that whether the sum of 18,325*l*. is or is not liable to income tax beyond the Sch. A assessment already made, the liability of the respondent for 4275*l*. remains and, in my view, the Crown are right in this contention. By s. 38, sub-s. 2, of the Finance Act, 1927, the total income means "the total income of that person from all sources estimated, as the case may be, either in accordance with the provisions of the Income Tax Acts as they apply to income tax . . . . or in accordance with those provisions as they apply to surtax." I am unable to see why this sum of 4275*l*. was not a part of the respondent's total income.

The learned judge has come to the conclusion that the distribution "is a distribution of a fund which is not liable to tax," and he says that: "It seems to me to follow, and to follow inevitably, that the recipient is not liable to tax." He continued: "It cannot, I think, be suggested that he is liable to income tax by direct assessment." I am unable to accept this conclusion. Because the liability of the company in respect of their profits is to be ascertained under Sch. A in regard to their profits arising from the ownership of land, it does not follow that the individual recipient of a dividend is not directly assessable under Sch. D as being in receipt of a profit or gain.

It is true that in *Gimson* v. *Inland Revenue Commissioners* (1) Rowlatt J. said: "He" (the shareholder) "can only be liable to pay super-tax in respect of a dividend which is taxable." But this view fails in my opinion sufficiently to distinguish between the company and its shareholders.

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(1) [1930] 2 K. B. 246, 253; 15 Tax Cas. 595, 601.

In *Hamilton* v. *Inland Revenue Commissioners* (1) Lord Hanworth M.R. said (2): "They" (the company and shareholder) "are two separate and different entities, and the shareholder is not merely paying an aliquot part of the taxation imposed upon the company." And again: "I think it is plain that the taxpayer must be treated as a separate entity, the company be treated as a collector, as has been said in one of the cases, for and on behalf of the Crown." The principle stated in *Blott's* case (3), by Lord Cave, that: "A company paying income tax on its profits does not pay it as agent for its shareholders," and the *Scottish Union* case (4), and, indeed, the whole current of authority, establish the position that, notwithstanding the special powers of deduction given to companies in appropriate cases under the rules in the Income Tax Acts, and by s. 7 of the Finance Act, 1931, such powers do not operate to prevent the recipient of the profit or gain in the form of dividend from being liable to income tax by direct assessment.

The learned judge was influenced in his decision by *Gimson's* case (5), which I have already mentioned. But, in my view, that decision cannot be supported so far as it is here relied upon by Finlay J. In that case, the Attorney-General had said (6) that: "When you get a dividend which does somehow or other come to the man from a fund which is not taxed, then it becomes . . . . 'an annual payment charged with tax under Schedule D'." Rowlatt J. refused to accept this view, but in my opinion it is correct, and the source of the profit or gain which the individual receives is not material when the liability of the individual to pay tax on the profit or gain is considered. Nor do I see that the liability to surtax is to be ascertained otherwise than in accordance with s. 38, sub-ss. 1 and 2, of the Finance Act, 1927, which sub-sections would be satisfied by requiring the return for surtax to include the sum of 4275*l.*

(1) [1931] 2 K. B. 495.

(2) Ibid. 517.

(3) [1921] 2 A. C. 171, 201.

(4) *Scottish Union, &c., Insurance Co.* v. *New Zealand, &c., Land Co.* [1921] 1 A. C. 172.

(5) [1930] 2 K. B. 246, 253; 15 Tax Cas. 595, 601.

(6) 15 Tax Cas. 601.

On the other hand, I am unable to see that the Crown can claim more than this sum. And to the extent of the difference between that sum and 5343*l.* 15*s.* the Commissioners were wrong. If the sum to be returned is the sum actually received, it is the lesser and not the larger sum. I do not think that the sum actually received can here be deemed to represent the larger amount, for the reasons stated by my Lord and by Romer L.J., with which reasons I concur.

ROMER L.J. It has been laid down on more than one occasion that for the purposes of taxation, just as for all other purposes, an incorporated company is one entity and its shareholders are separate and distinct entities. The most recent case in which this principle was approved and applied is that of *Hamilton* v. *Inland Revenue Commissioners* (1), a decision of this Court. Stated shortly, the question in that case was whether a company when distributing a sum as dividend among its shareholders could deduct a greater sum in respect of income tax than the company had itself been charged with for such tax in respect of the sum so distributed. It was held that there was no connection whatever between the two taxes; that the company was one taxpayer and the shareholders were separate and distinct taxpayers, and that the company was entitled to deduct from the dividends paid income tax at the then current rate, regardless of the rate at which income tax had been paid by the company upon the profits from which the sum distributed had been derived. In the case of an individual A., who pays an annuity to another individual B., A. is one taxpayer, and B. is another, and the amount or rate of income tax chargeable in respect of B.'s annuity depends in no way whatsoever upon the amount or rate of income tax paid by A. The question of what A. himself pays as income tax is only material for the purpose of ascertaining how the income tax on B.'s annuity is to be collected, as will presently appear. Now the case is precisely the same if an incorporated company be substituted for A. and its dividend-receiving shareholders for B. At this stage, however, it is necessary to refer to the decision of Rowlatt J. in *Gimson* v. *Inland Revenue Commissioners.* (1) In that case an incorporated company had declared a dividend of 5*l.* per cent. "actual" on its ordinary shares. A shareholder who held 1500*l.* ordinary shares received a sum of 75*l.* without any deduction. Of this sum 40*l.* represented a capital payment. But a question arose as to the remaining 35*l.* for the purpose of ascertaining the shareholder's liability in respect of super-tax. It seems to have been contended in the first instance that the shareholder must be deemed to have been paid 35*l.* free of tax and was therefore assessable to super-tax in respect of 44*l.* as representing the gross dividend. In the argument before Rowlatt J., however, the Commissioners took up the position that the 35*l.* was the amount of the gross dividend in respect of which the shareholder was himself directly assessable to income tax or from which the company ought to have deducted the tax at source. In ordinary circumstances the question whether the shareholder should have been assessed to super-tax on 44*l.* or 35*l.* would or might itself depend upon the question whether or not the dividend was payable out of profits or gains of the company brought into charge as will appear later. The shareholder, however, resisted assessment in either amount upon the ground that the 35*l.* had been paid by the company out of a fund that in the hands of the company was not (as indeed was conceded) chargeable to income tax at all, and accordingly was not chargeable to income tax when paid over to the shareholders. This argument prevailed before the learned judge. He said (2), speaking of the shareholder in question: "If this gentleman had received this money not from the company but direct, by holding the source of income himself and had been liable to income tax in nil because of the regulations affecting measurement, his income would not be subject-matter on which he could . . . . pay super-tax." Pausing there, no exception can, of course, be taken to what the learned judge said. But he went on as follows: "So in the case of a company, although the Attorney-General very properly referred to what I said in *Blott's* case (1), which is a material case, although the case of a company is different, in essence it is the same, ... He can only be liable to super-tax in respect of a dividend which is taxable." Now this passage seems to indicate that a dividend is not taxable when the fund out of which it is paid is not taxable. With all respect to the learned judge this is wrong. It is contrary to the principle upon which *Hamilton's* case (2) was decided and which had been enunciated in earlier authorities. A dividend (in which term, of course, I do not include a capital distribution) is taxable because it is charged with income tax by virtue of Sch. D. The fund out of which it is paid may be taxable under that Schedule or under one of the others. But the fact that the fund is taxable at a different rate or under a different Schedule involving a different method of computation for tax purposes is beside the mark, just as it would be beside the mark if it were an annuity or interest on a debenture that was being paid and not a dividend. In my judgment, *Gimson's* case (3) was wrongly decided, and ought to be overruled.

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(1) [1931] 2 K. B. 495.

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(1) [1930] 2 K. B. 246; 15 Tax Cas. 595.
(2) 15 Tax Cas. 601.

To return to the present case, it is said by the respondent, and was not disputed by the Crown, that the sum distributed by the company, of which the 4275*l.* formed the respondent's proportionate share, was paid out of a surplus of accumulated rents which remained in the hands of the company after profits had been distributed to the amount of any assessments made upon the company. I do not know how any one could say that a sum of money in the company's coffers represented rents, but if the word "fund" be substituted for the words "surplus of accumulated rents" it is no doubt an accurate statement. The matter is, however, of no importance to the question with which I am dealing. For, whatever was the source of that fund, the dividend, not being a capital distribution, was chargeable with income tax under Sch. D, and the fact (if fact it be) that the fund in the hands

(1) [1920] 1 K. B. 114; 8 Tax Cas. 101. (2) [1931] 2 K. B. 495.
(3) [1930] 2 K. B. 246.

of the company had not been brought into charge when ascertaining the company's own liability to income tax, is, in my judgment and for the reasons that I have given, a wholly irrelevant consideration.

For the purpose, however, of ascertaining what is to be considered for the purposes of surtax the gross amount of that dividend, the fact possesses considerable importance. Had the payment to the respondent been a payment of interest on debenture stock and not a dividend, the question whether the payment was or was not made out of profits and gains of the company brought into charge would be irrelevant for the purpose of the assessment of the respondent to surtax. For in either case, income tax would be deductible by the company either by virtue of r. 19 or by virtue of r. 21 of the All Schedules Rules in the Income Tax Act of 1918. If deducted under r. 19, the company could retain the tax for its own benefit. If under r. 21 the company would have to account for the tax to the Crown. In either case, however, the respondent would, of course, be assessed for surtax in the gross amount of the interest paid. A dividend stands, however, on a somewhat different footing, for the deduction of the tax on payment was, before the passing of the Finance Act, 1931, governed by r. 20 of the All Schedules Rules. The words of that rule were difficult to construe. As I ventured to point out in *Hamilton's* case (1), the rule, if construed strictly, only authorized the deduction of the tax from a dividend paid out of the profits or gains in respect of which the company was chargeable, and would not apply to a dividend paid out of profits and gains in respect of which the company was not chargeable. I should, however, but for s. 7 of the Finance Act of 1931, have been prepared to treat the rule as applicable to all dividends paid by a company, even when paid out of profits and gains not brought into charge. That section renders it difficult or rather impossible to do so.

Before dealing with that section, however, it is necessary to point out another difficulty that might formerly have

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(1) [1931] 2 K. B. 495.

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occurred in the case of the payment of a dividend. As a rule the resolution declaring a dividend makes it clear whether it is going to be paid tax free or after deduction of tax. But suppose the resolution is silent upon the matter and the dividend declared is paid by the company in full. Is the dividend to be treated as gross or net? Rule 20 did not make it compulsory upon the company to deduct the tax even in the case of a dividend paid out of profits and gains not brought into charge, and it certainly seems doubtful in view of the language of that rule whether r. 21 applies to a dividend at all. This particular difficulty has to a large extent been removed by s. 7, sub-s. 2, of the Finance Act, 1931. But sub-s. 1 of that section creates another. That sub-section enacts that r. 20 shall in relation to a dividend paid whether before or after the commencement of the Act be construed as authorizing the deduction of tax from the full amount paid out of profits and gains which have been charged to tax or which under the provisions of the Income Tax Acts would fall to be included in computing the liability of the company to assessment to tax for any year, if the said provisions required the computation to be made by reference to the profits and gains of that year and not by reference to those of any other year or period. Sub-s. 2 is, so far as material, in these terms: "Subject as hereinafter provided, a dividend paid by a body of persons, whether before or after the commencement of this Act, shall, to the extent to which it is paid out of such profits and gains as are mentioned in sub-section (1.) of this section, be deemed, for all the purposes of the Income Tax Acts, to represent income of such an amount as would, after such deduction of tax as is authorised by the provisions of the said Rule 20, be equal to the net amount received." It will be seen that sub-s. 1 provides for a construction being put upon r. 20 that would have justified the deduction of tax from the dividend paid in *Gimson's* case (1), and that sub-s. 2 would have justified the assessment of Gimson for super-tax in the sum of 44*l*. in respect of the payment to him of the dividend of 35*l*.

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(1) [1930] 2 K. B. 246; 15 Tax Cas. 595.

For the dividend had been paid out of profits and gains which would have fallen to be included in computing the liability of the company if the computation had to be made by reference to the profits and gains of the year of assessment. But, while bringing such a dividend as was paid in *Gimson's* case (1) within the provisions of r. 20, sub-s. 1 renders it, in my opinion, impossible to bring the dividend paid in this case within those provisions or within the provisions of sub-s. 2. Had sub-s. 1 provided that r. 20 should be construed as authorizing the deduction of tax from the full amount paid out of profits and gains whether such profits and gains had or had not been charged to tax, a construction that I should, I think, have been prepared to put upon r. 20 as it stood, the question arising upon this appeal could not have arisen. The sub-section, however, renders such a construction impossible. It was indeed contended by the Attorney-General that the rents received by the company in the present case in excess of the annual value of the premises that were subjected to tax under Sch. A were in truth profits and gains charged to tax. As a general proposition, I think that this is true. Under Sch. A tax is charged in respect of the property in all lands, tenements, hereditaments and heritages in the United Kingdom, and then are added these words: "for every 20*s.* 0*d.* of the annual value thereof." Such words, however, do no more, in my opinion, than indicate the method in which the amount of the tax is to be ascertained, and do not substitute for a tax in respect of the property a tax in respect of its annual value. The annual value is merely the measure of the liability of the tax. This was, I think, the view taken by the House of Lords in the *Salisbury House* case. (2) It will be sufficient to refer to what was said by Lord Warrington and Lord Tomlin. The former, when speaking of a landowner who turned his land to profitable account, said this (3): "Such a person would I

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(1) [1930] 2 K. B. 246; 15 Tax Cas. 595.

(2) [1930] A. C. 432; 15 Tax Cas. 266.

(3) [1930] A. C. 451.

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think clearly be assessable under Schedule A only, and his taxable income would be measured by the conventional annual value and not by the amounts of the rents he actually received." Lord Tomlin said (1): "When once the annual value has been ascertained and fixed for the purposes of Schedule A, it is irrelevant to consider whether the landlord in fact receives by way of rent more or less than or the same as the assessed annual value. The subject-matter—namely, land in respect of its property quality—being necessarily taxed under Schedule A cannot be brought again under any other Schedule. To do so would offend the rule against double taxation." Indeed, if the House of Lords had not held the view that I have attributed to them, their decision in the case must have been in favour of the Crown. For if only annual value was taxed under Sch. A, and not the income of the property, the excess of the rents over annual value was clearly taxable under Sch. D, Case VI. But I need not pursue this subject, because the words "profits and gains brought into charge," as used in rr. 19 and 21, have been given a more restricted meaning than they would receive in general and apart from the context of these rules.

In the case of *Attorney-General* v. *Metropolitan Water Board* (2) the facts for the present purpose can be taken to have been as follows. The profits of the Water Board were assessable to income tax by reference to the profits of the year preceding the year of assessment. For the tax year 1921–1922 the Board earned no profits. Accordingly, for the year ending April 5, 1923, they paid no income tax. In that year, however, they in fact made a very large profit, and out of such profit paid the interest on their debenture stock after deducting income tax. The question then arose between the Commissioners of Inland Revenue and the Board whether the interest had been deducted out of profits or gains brought into charge within the meaning of rr. 19 and 21. If it had, the Board were entitled to retain the tax deducted for their own benefit. If not, they were accountable to the Crown for such tax. It was held by this Court that the interest had not been paid out of profits or gains brought into charge within the meaning of that rule. The argument on behalf of the Water Board was as follows. The profits or gains of the Board brought into charge to tax for the year 1922–23 were the actual profits of that year, though the liability to income tax for that year was to be measured by the amount of the profits of the preceding year. This argument did not succeed. It was in effect held that for the purpose of the rules the words "profits or gains brought into charge" mean the sum that is taken to measure the liability for the charge. In the case of the Water Board that sum for the year 1922–23 was nil. The interest, though in fact paid out of the actual profits of the year, had not therefore been paid out of profits or gains brought into charge. In the following year, even if the Board made no profit at all, the interest, however it was in fact provided, would be deemed to have been so paid, for the Board would have been chargeable to income tax by reference to the profits earned during the preceding year. Applying that decision to the present case, it would seem to follow that the dividend of 4275*l.* was not paid out of profits or gains brought into charge within the meaning of rr. 19 and 21. Had any part of the "surplus rents" been applied in payment of interest on debenture stock the company would, in accordance with the decision, have had to account to the Crown for the tax deducted. Now the words in sub-s. 1 of s. 7 of the Finance Act, 1931, are "profits and gains which have been charged to tax," differing slightly from the words in the rules. I do not, however, see any justification for giving the former a different construction from that placed by this Court upon the latter. The addition, in the sub-section, of the words that follow seem, moreover, to be an indication by the Legislature that the preceding words are to bear the same construction as the words in the rules, and are to bear the same construction as was placed upon those rules by this Court in the *Metropolitan Water Board* case. (1) The Crown cannot now avail itself of an argument that it defeated so successfully when advanced by the Metropolitan Water Board.

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(1) [1930] A. C. 462.

(2) [1928] 1 K. B. 833; 13 Tax Cas. 294.

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(1) [1928] 1 K. B. 833; 13 Tax Cas. 294.

If I am right so far, it would seem to follow that s. 7 does not apply to the present case and that r. 20 cannot be read as authorizing a deduction of tax by the company from the dividend paid to the respondent.

That being so, the company must be deemed to have paid him a gross dividend of 4275*l.* This should have been included by the respondent when making his return of income from all sources for the year 1929–30, and he was properly assessable in that sum for surtax. It was contended on his behalf by Mr. Latter that he could not be so assessed, inasmuch as he had not been assessed to income tax in respect of the dividend. This, however, appears to me to be immaterial. Had he included it in his return, as he should have done, I cannot see how he could have escaped paying income tax upon it in due course. He cannot be in any better position by having failed to make a proper return.

For these reasons, I am of opinion that this appeal should be allowed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Holmes, Son & Pott.*

H. C. G.

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[1932. B. 5320.]

Practice—Service Out of the Jurisdiction—English Charterparty—Arbitration Clause providing for Arbitration in Hamburg—Award—Action to enforce—Defendant resident in France—R. S. C., Order XI., *r.* 1 (*e*).

On November 19, 1929, a charterparty was made in London which provided that any dispute arising during the execution of the charterparty should be settled by arbitration in Hamburg. In 1931, disputes arose between the parties which were submitted to arbitration in Hamburg, and an award made against the defendant for 20,913*l.* 13*s.* 7*d.*, payment to be made in English currency. On November 29, 1932, the plaintiffs, who were a German firm, obtained ex parte an order that they should be at liberty to issue a writ against the defendant, who was residing in France, claiming the amount due and payable under the award, and to serve notice of the writ on the defendant in France. On January 5, 1933, the defendant applied to have that order set aside, but Goddard J. dismissed the application. On appeal:—

Held (affirming Goddard J.'s decision), (1.) that the order for service out of the jurisdiction was properly made under Order XI., r. 1 (*e*), as the action based on the award was for the enforcement of a contract made within the jurisdiction—namely, the submission to arbitration contained in the charterparty; but (2.) that the order could not be supported on the ground that the breach of contract was committed within the jurisdiction, as the award had not required payment in England, and the ordinary rule therefore applied that the debtor must seek out his creditors, the German firm, at their place of business and pay them there.

Authorities on the question whether in an action on an award the action is founded on the award or on the agreement to submit the differences from which the award results discussed.

Quaere whether an action may be brought upon an implied contract in the award itself.

APPEAL from Goddard J.

The following statement of the facts is taken from the judgment of Slesser L.J. :—

In this case Branson J., on an application ex parte by the plaintiffs, on November 29, 1932, made the following order : "That the intended plaintiffs be at liberty to issue a writ of summons against the intended defendant. And it is further ordered that the intended plaintiffs be at liberty to serve notice of the said writ at Paris or elsewhere in the Republic of France and that the time for appearance to the said writ by the said intended defendant be within twelve days after the service of the said notice of writ." On January 5, 1933, the defendant, who resided in France, applied to Goddard J. for an order that the order "of the Honourable Mr. Justice Branson herein dated the 29th November, 1932, the writ of summons issued herein, and the notice thereof ordered to be served, and the service thereof on the defendant, and all subsequent proceedings herein be set aside on the ground that the award sued upon does not provide that the amount awarded is payable in England and that there is, therefore, no breach within the jurisdiction of the award or of the charterparty referred to." Goddard J., after hearing the parties by counsel on January 13, 1933, ordered that the defendant's application be dismissed and that the costs of the application be the plaintiffs' in any event. From that order the defendant appeals to this Court.

The facts of the case, from an affidavit of Mr. John Essberger of Hamburg, sworn on November 19, 1932, at Hamburg, in support of the ex parte application, appear to be as follows. On November 19, 1929, by a charterparty made in London in the English language, the defendant agreed to hire a vessel of the plaintiff company called the *Mittelmeer* or a substitute sister ship for as many consecutive voyages as the vessel could perform over two years. The charterparty was exhibited to the affidavit, and in the charterparty, by clause 18, it was provided that: "Any dispute arising during the execution of this charterparty shall be settled in Hamburg. Owners and charterers each appointing an arbitrator, merchant or broker, and the two thus chosen, if they cannot agree, shall nominate a third, whose decision shall be final. Should one of the parties neglect or refuse to appoint an arbitrator, merchant or broker, within twenty-one days after receipt of request from the other party, the single arbitrator appointed shall have the right to decide alone, and his decision shall be binding on both parties. For the purpose of enforcing awards, this agreement shall be made a rule of Court."

In the summer of 1931, disputes arose between the plaintiffs and the defendant and, in accordance with the terms of the charterparty, the parties proceeded to arbitration in Hamburg, and on April 22, 1933, an award was duly made in Hamburg, which decided as follows: "Defendant, the complaint being refused, is sentenced to pay to plaintiff 20,913*l.* 13*s.* 7*d.*, the cost of arbitration, stipulated at RM 10,000—and his expenses are to be presented by plaintiff; defendant has to indemnify plaintiff for two-thirds of same. The non-judicial expenses are to be neutralized against one another." And it was further decided: "As per clause 2 of the charter, payment is to be made in English currency, i.e., effectively. The printed clause that the money can be changed into a Continental currency has been cancelled." The reference to the printed clause that the money can be changed "into a Continental currency has been cancelled" is directed to a provision as to the freight in which in clause 2 of the printed charterparty, after stating "the freight to be payable in London upon delivery of the cargo in cash, without discount," the words "if on the Continent at the current rate of exchange on London at sight" were deleted.

It remains to set out the indorsement on the writ which, so far as material, is as follows: "The plaintiffs' claim is 21,333*l.* 4*s.* 7*d.*, the amount due and payable by the defendant to the plaintiffs under an award in writing dated April 18, 1932, of Dr. Rudolph Firle, Friedrich Joch and Dr. Knauer the duly appointed arbitrators in an arbitration held between the parties pursuant to a submission in writing contained in a charterparty entered into by the plaintiffs and the defendant dated the 19th November, 1929, for the chartering of the plaintiffs' tank steamer *Mittelmeer* or substitute."

The appeal was heard on February 1, 1933, and judgment delivered on February 13, 1933.

Sir Robert Aske for the appellant. The Court ought not to have allowed service of notice of the writ out of the jurisdiction, for the facts of the case do not bring it within Order XI., r. 1 (*e*). This is a case where the plaintiffs are a

Hamburg firm and the defendant resides in Paris, and the action is on an award made in Hamburg in respect of the breach of an English charterparty. The Court should exercise caution before exercising their jurisdiction: *The Hagen* (1); see also *Merrifield, Ziegler & Co.* v. *Liverpool Cotton Association, Ld.* (2) It is sought to justify the order by a contention that the sum awarded for breach of the charterparty was made payable in England in cash. That is not correct. There was nothing in the charterparty to make it payable in England, and the award did not direct payment here. Again, this action is one based on the award made in Hamburg; it is not based on the submission to arbitration contained in the charterparty. The submission is only referred to in order to show the right of the arbitrator to make his award: Bullen & Leake, 3rd ed., p. 71. That the action is on the award is established by *Hodsden* v. *Harridge.* (3) It was there held that the award was not a contract, but that the action was quasi ex contractu founded on the submission which enabled a third party to make an award on which a right of action arises. The old plan was to have bonds of submission, and in *Ferrer* v. *Oven* (4) a distinction is drawn between an action on an award and an action on a bond of submission: see also for a summary of the old practice the notes to *Hodsden* v. *Harridge.* (3) The cases so far cited make it clear that when an action is brought on an award and not on the original contract containing the submission, the debt arises directly out of the award, and the original contract has nothing to do with it. A decision to the contrary is, however, to be found in *Purslow* v. *Baily.* (5) But in any case Order XI., r. 4, requires that the grounds upon which the application for service out of the jurisdiction are based shall be set out in the applicants' affidavit. And the only ground the plaintiffs have based their claim on is that the debt was payable here. They have not sought to justify it on the ground that the action arises out of a contract made here, and a plaintiff is precluded from relying on any ground not set out in his affidavit: *Parker* v. *Schuller*. (1)

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(1) [1908] P. 189, 201.
(2) (1911) 105 L. T. 97.
(3) (1670) 2 Wms. Saund. 150.
(4) (1827) 7 B. & C. 427.
(5) (1704) 2 Ld. Raym. 1039.

[SLESSER L.J. Is it not sufficient that the affidavit states that the charterparty was made in England and sets out the submission?]

It is submitted not. If it was being alleged that the action was on the submission in the charterparty, and the application for service out of the jurisdiction supported on that ground, that should have been made clear: *Lazard Brothers & Co.* v. *Banque Industrielle de Moscou.* (2)

C. T. Miller for the respondents. Every claim under an award is ultimately founded on a contract to be found in the submission in writing: *Lang* v. *Brown* (3); *Lievesley* v. *Gilmore* (4); and see Russell on Arbitration and Award, 12th ed., p. 276. These later authorities are, it is true, difficult to reconcile with *Hodsden* v. *Harridge.* (5) But that case shows that it is necessary to allege a mutual submission, and the reason is that the action is really founded on the submission: see also *Dilley* v. *Polhill.* (6) Therefore the order under Order XI., r. 1 (*e*), can be supported on the ground that the action is on an English contract, and it is contended that this ground was sufficiently brought out in the affidavit on the ex parte application.

Further, the breach is one committed within the jurisdiction. Although the arbitrators do not say so in terms, it is clear that they meant to award a sum payable in London.

[SLESSER L.J. The ordinary rule is that a debtor seeks out his creditor to pay him. Payment would therefore be in Hamburg.]

That would be so if the charterparty did not expressly or by necessary implication provide for payment in London.

Sir Robert Aske replied and referred to *Norske Atlas Insurance Co.* v. *London General Insurance Co.* (7)

Cur. adv. vult.

(1) (1901) 17 Times L. R. 299.
(2) [1932] 1 K. B. 617, 637.
(3) (1855) 25 L. T. (O. S.) 297.
(4) (1866) L. R. 1 C. P. 570.
(5) 2 Wms. Saund. 150.
(6) (1732) 2 Strange, 923.
(7) (1927) 43 Times L. R. 541.

Feb. 13. SLESSER L.J. [after stating the facts:] The defendant, who, we are told, is a British subject, is resident in Paris, and the plaintiffs claim to serve their writ out of the jurisdiction on two grounds: First, they say that the action is one brought against the defendant to enforce a contract made within the jurisdiction (Order XI., r. 1 (*e*), para. (i.)), and, secondly, that the action is one brought against the defendant in respect of a breach committed within the jurisdiction (Order XI., r. 1 (*e*), final paragraph).

I deal with these two grounds separately. First, it was argued for the appellant that, in so far as Order XI., r. 4, requires that the grounds upon which the application is made shall be set out in the application in the affidavit, the first of these grounds was not so set out, and that the point was therefore not open to the plaintiffs. I am of opinion that this contention is not well founded. Para. 1 of Mr. Essberger's affidavit of November 19, 1932, states that the charterparty was made in London. It is true that, when he is arguing in para. 7 of that affidavit, he relies upon the fact that a breach arose within the jurisdiction of the Court. That is to raise the second ground; but, in my opinion, having averred that the charterparty was made in London, he has sufficiently indicated that he relies upon that fact. If he had relied solely on the second ground the place of making the contract would be irrelevant, for that rule expressly provides that if the breach be committed within the jurisdiction, service out of jurisdiction may be ordered with respect to a breach committed within the jurisdiction of a contract *wherever* made.

I proceed, therefore, to consider the case made on behalf of the plaintiffs that this award, on which they seek to sue, arose in respect of a contract made within the jurisdiction. This contention raises at the outset the following juridical problem: What is the nature of an action based upon an award? On the one hand, it is said for the respondents that, in so far as the submission is a contract whereby the parties to it impliedly undertake to abide by and carry out the award of the arbitrators, the submission is contained in the charterparty which is made in London, and, therefore, the enforcement of the award would be the enforcement of a contract made within the jurisdiction. On the other hand, it is contended for the appellant that the action is brought on the award itself and that, consequently, as the award was made in Hamburg the action is not the enforcement of a contract made within the jurisdiction.

The respective contentions require for their proper consideration some study of the history of the legal principles which govern the enforcement of awards at common law and in equity. The contention of the respondents that the submission is the contract on which an action based on the award is founded is well supported by authority. In the case of *Purslow* v. *Baily* (1) Holt C.J. said (2): "The submission is an actual mutual promise to perform the award of the arbitrators; and in such actions, while he was a practiser, and since he had been judge, the submission had been always held sufficient evidence to maintain the action." This view is accepted in the latest edition of Russell on Arbitration, 12th ed., p. 276, and there are many later dicta to be found, more particularly in cases for the enforcement by or for specific performance on the equity side to the like effect. Thus in *Wood* v. *Griffith* (3) Eldon L.C. said (4): "That a bill will lie for the specific performance of an award, is clear; for the award contains nothing more than an agreement, on terms which a third person points out." In *Nickels* v. *Hancock* (5) Knight Bruce L.J. said (6): "A bill—the bill now before us—has been filed for the purpose of obtaining specific performance of the award, in the exercise by this Court, not of any jurisdiction peculiar to awards, but of its ordinary jurisdiction applicable to agreements. Many therefore, if not all, of the principles applicable to ordinary cases or suits for the specific performance of agreements must apply to the present case." And Turner L.J. said (7): "In considering, therefore, the question, whether the Court ought in any particular case to interfere for the purpose of enforcing an award, the first point to be looked at is, what have the parties agreed to submit to the arbitrator ? "

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(1) 2 Ld. Raym. 1039.
(2) Ibid. 1040.
(3) (1818) 1 Wils. Ch. 34.
(4) (1818) 1 Wils. Ch. 44.
(5) (1855) 7 D. M. & G. 300.
(6) Ibid. 314.
(7) Ibid. 318.

The rights of the parties in respect of specific performance are the same as if the award had simply been an agreement between them: per Lord Cranworth L.C. in *Blackett* v. *Bates* (1); see also Erle C.J. in *Lievesley* v. *Gilmore* (2), where he says: "There was, therefore, an agreement between the parties that the matters in difference should be referred, and that the award should be performed."

So far it would appear clear that in the opinion both of common law and equity judges the award is to be regarded as merely the working out of a term of the original agreement of submission, and there is other perhaps more indirect authority to the same effect, as in *Llanelly Ry. and Dock Co.* v. *London and North Western Ry. Co.* (3), where James L.J. said: "It would be difficult to say that the real question between the parties could be determined by the arbitrator under that clause; because, if the plaintiffs are right in their contention, they have determined that part of the agreement as well as everything else."

In Leake on Contracts, 8th ed., p. 740, it is said: "A submission by consent . . . . implies an agreement to perform the award; upon which an action will lie for non-performance. The action may be in the form of a claim for debt or damages, or for specific performance." On the other hand, counsel for the appellant has cited to us certain decisions which seem to support the contrary view, that action may be brought upon the award itself. The most recent case cited was that of *Norske Atlas Insurance Co.* v. *London General Insurance Co.* (4) There the plaintiff's claim was based on an award made in Norway by Norwegian arbitrators. The defendants said that the award was made pursuant to a submission in a treaty of reinsurance against marine risks in a written

(1) (1865) L. R. 1 Ch. 117, 124.
(2) L. R. 1 C. P. 570, 572.
(3) (1873) L. R. 8 Ch. 942, 948, 949.
(4) 43 Times L. R. 541.

agreement and that the treaty was a treaty of marine insurance and was not expressed in a policy sufficient to satisfy the Stamp Act and the Marine Insurance Act. The plaintiffs argued that this agreement was not a contract of insurance at all. MacKinnon J. was of opinion that, if the plaintiffs were suing upon the treaty for marine losses under insurances they were making, the pleas in defence would be fatal to the plaintiff. They would be suing upon a contract of marine insurance which, first of all, was not expressed in a policy, and, secondly, was not stamped as a policy needs to be. He continues: "But in my judgment the question is not that at all. The plaintiffs here are suing on the award. In order to sue on an award, it is, I think, necessary for the plaintiffs to prove, first, that there was a submission; secondly, that the arbitration was conducted in pursuance of the submission; and, thirdly, that the award is a valid award made pursuant to the provisions of the submission, and valid according to the lex fori of the place where the arbitration was carried out and where the award was made." Certainly in this case MacKinnon J. seems to treat the action as one upon the award as such and not as an action on the marine reinsurance contract, which he finds was invalid. The issue which I have here to consider was not directly argued before the learned judge, the point being, according to counsel, whether the contract of marine reinsurance was or was not invalid, and the authorities cited were none of them related to the problem whether the action was brought upon the award or upon the contract of submission. Nor does the learned judge, although his decision on the point is clear, cite any authority on that head.

Nevertheless there does exist earlier authority which supports his view—namely, the case of *Hodsden* v. *Harridge*. (1) In that case, there being disputes between the plaintiff and the defendant, the parties submitted themselves to arbitration; and, the arbitrators disagreeing, an umpire awarded 15*l*. to the plaintiff. The defendant pleaded in bar the Statute of Limitations, and the question was whether the action of debt on the award was within the statute of James I. or not. Counsel for the plaintiff argued that the award was not within the statute, because the words of the statute were "all actions of debt grounded upon any lending or contract without specialty shall be sued within six years." He argued, first, that in so far as the umpire had made his award in writing under his hand and seal, it was a specialty and so without the statute, and, secondly, that admitting there was no specialty, the action for debt on the award was not limited by statute, because only actions of debt, without specialty, were limited which were grounded upon any lending or contract and that this action of debt was not so founded upon any lending. In the result Kelynge C.J. held that there was a sufficient specialty, while Twysden J. held that it was not within the statute because it was not founded upon any lending or contract. It is stated that the other judges agreed with both points, and Twysden J., on motion for judgment, said in terms that it was resolved by the Court for the plaintiff on both points.

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(1) 2 Wms. Saund. 150.

The second point concerns us not in the present case, but the decision of the Court that the action on the award was made on a specialty is a decision in favour of the appellant's contention in this case, because the specialty was only in the award itself and not in the agreement of submission to arbitration, so that clearly the Court held the action to be based upon the award itself and not upon the submission which was not under seal. In *Dilley* v. *Polhill* (1) there is a distinction drawn by the Court between an action so brought upon a bond of submission and where it is upon the award. The question there arose whether in an action for debt on an award a mutual submission must be shown in the declaration. It was argued that an award is the determination of a third party between two others who submit to his judgment and that the submissions create a mutual obligation upon both to acquiesce in his decision. The Court said (2): "There is a great deal of difference where the action is brought upon the bond of submission, and where it is upon the award; in the first case" [the bond] "the defendant by craving oyer shews that there were mutual submissions, the condition always so reciting it; but in the other case" [where it is upon the award] "it must be averred, before you can properly introduce your award." On a reference to arbitration the submission used sometimes to be made by mutual bonds, the obligation being in the form of a common money bond to abide the event of the award. And in *Ferrer* v. *Oven* (1) the Court held that in action in debt on an award it is necessary for the plaintiff to allege a mutual submission. In the language of Bayley J. (2): "By declaring on the award, the plaintiff takes upon himself the onus of proving a mutual submission. By declaring on the bond, he transfers the burden of proof to the defendant; for it lies on the latter to discharge himself from the penalty by showing a performance of the conditions." This view is expressed in Bullen and Leake, 3rd ed., p. 71, where the *indebitatus* count on an award is stated to be "Money payable by the defendant to the plaintiff for money awarded by the arbitrator to be paid by the defendant to the plaintiff, by an award of the said arbitrator made under a submission to his arbitration by the plaintiff and defendant, of matters in difference between them." The plea of never indebted to an *indebitatus* count on an award denies the submission to arbitrate, say the same learned authors (p. 488). So that it appears clear that under the old pleading the averment of submission was essential to an action upon the award though not to an action upon a bond of submission.

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(1) 2 Str. 923.

(2) Ibid. 924.

As I understood the argument of Sir Robert Aske, he asks us to consider the present action to be one analogous to the old action of debt on bond conditioned to perform an award, but the action in the present case cannot possibly be brought within the observations of the Court in such cases as *Dilley* v. *Polhill* (3) and *Ferrer* v. *Oven* (1), where it is said that by declaring on the bond the plaintiff need not prove the mutual submission. In cases on bond before the statute 8 & 9 Will. 3, c. 11, the plaintiff sued for the penalty, without assigning the

(1) 7 B. & C. 427. (2) Ibid. 430. (3) 2 Str. 923.

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breaches, and in the earlier cases it must always be borne in mind that in actions in debt on the bond, the action may have been for penalty. They are not material for the present problem. I observe that in *Welch* v. *Ireland* (1) the Court used the phrase : " The bond being to perform an award, in other words, to perform an agreement." In *Lang* v. *Brown* (2) the Lord Chancellor said this (3) : " What we have to consider, therefore, is whether the award which was then made is an award which the parties agreed should be binding on them." And again : " There is this provision in the deed of submission. The parties begin thus : they agree to submit all differences."

It would appear, therefore, that the greater weight of authority is in favour of the view that in an action on the award the action is really founded on the agreement to submit the difference of which the award is the result. The legislation dealing with awards supports this view. By 3 & 4 Will. 4, c. 42, s. 3, it was provided that : " All actions of debt upon any award where the submission is not by specialty " should be commenced and sued within the there stated time—this points to the conclusion that the Legislature in 1833, in an Act said to be " for the better advancement of justice," in dealing with limitations of actions, had regard to the nature of the submission in founding the action of debt upon the award. Interesting as these problems are, even if there still be recognized by the law such an action upon the award itself (where there is no order of Court under the Arbitration Act, 1889, s. 12, or under the Arbitration (Foreign Awards) Act, 1930, neither of which here apply) as appears to have been contemplated in the case of *Hodsden* v. *Harridge* (4) and assumed by MacKinnon J. in *Norske Atlas Insurance* case (5), it is sufficient for the purpose of the plaintiffs here to show that, at any rate, they are entitled to say that on their claim they are suing on the charterparty made in London and more particularly on the submission to arbitration therein contained.

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(1) (1805) 6 East, 613, 614.

(2) 25 L. T. (O. S.) 297.

(3) 25 L. T. (O. S.) 298.

(4) 2 Wms. Saund. 150.

(5) 43 Times L. R. 541.

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The few cases which appear to support the view that an action may be brought upon the award in my view do not exclude in any event an action brought upon the agreement to refer differences and for this purpose, in my view, the submissions are here sufficiently stated to be in the charter-party of November 19, 1929. Without, therefore, finally determining whether an action may or may not be brought on an implied contract in the award itself, I am clearly of opinion that it may be brought upon an agreement containing a term to refer disputes, and that the present claim is properly pleaded as arising from such an agreement.

It is, therefore, an action for the enforcement of a contract made within the jurisdiction. If it appears that a claim is partly within and partly without the order authorizing service out of the jurisdiction, the judge may give leave for service; it is a matter within his discretion: see *Thomas* v. *Duchess Dowager of Hamilton.* (1)

As regards the second contention, that the respondents are bringing an action in respect of a breach committed within the jurisdiction, I think that they fail. It is said in the first place that their affidavit, on which their ex parte order was obtained, contained a serious inaccuracy when it stated in para. 5 that the damages were assessed payable in England in cash. I agree with this contention. There is no authority for saying that the award requires the payment to be made in England, and such an inaccuracy on an ex parte affidavit might well vitiate the rights which were then won by it. In the language of Scrutton L.J. in *Lazard Bros. & Co.* v. *Banque Industrielle de Moscou* (2): "Persons applying ex parte to the Court must use the utmost good faith, and if they do not, they cannot keep the results of their application." But here, even were the affidavit to be unimpeachable, I think that the plaintiffs must fail. The award, in fact, states no place of payment, and as no evidence of German law was given, it is to be assumed that English law prevails in such a matter, and in such a case it is the duty of the debtor to seek out his creditor. Prima facie, in commercial transactions when cash is paid by one person to another, that means it is to be paid at the place where the person who is to receive the money resides or carries on business—(per Kay L.J. in *Rein* v. *Stein* (1))—in this case at Hamburg. Thus, if it is suggested that the appellant committed a breach by non-payment of the sum awarded, the alleged breach was not within the jurisdiction. The allegation in the affidavit that payment was to be made in England is thus irrelevant and need not be considered.

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(1) (1886) 17 Q. B. D. 592.

(2) [1932] 1 K. B. 617, 637.

I think that this appeal should be dismissed, solely upon the ground that the agreement which it is sought to enforce is based upon the charterparty and not upon the award itself, and, therefore, was made within the jurisdiction.

In the result, therefore, this appeal must be dismissed, with costs.

ROMER L.J. I agree.

Appeal dismissed.

Solicitors: *Holman, Fenwick & Willan; Thomas Cooper & Co.*

(1) [1892] 1 Q. B. 753, 758.

H. C. G.

BUCKLAND *v.* THE KING.

[1932. B. 453.]

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Feb. 10, 13.

Customs—Importation of Goods—Cinematograph Films—Liability to Entry—"Baggage of passengers"—Detention by Customs—New Duty coming into Force—Customs Consolidation Act, 1876 (39 *&* 40 *Vict. c.* 36), *s.* 66—*Finance Act,* 1901 (1 *Edw.* 7, *c.* 7), *s.* 7, *sub-s.* 2—*Finance Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 36), *s.* 3.

By s. 66 of the Customs Consolidation Act, 1876: "If any goods . . . . be taken or delivered out of any ship or out of any warehouse, not having been duly entered, the same shall be forfeited: Provided always, that no entry shall be required in respect of the baggage of passengers which may be examined, landed, and delivered under such regulations as the Commissioners of Customs may direct, but if any prohibited or uncustomed goods shall be found concealed therein, either before or after landing, the same shall be forfeited, together with everything packed therewith."

By s. 7, sub-s. 2, of the Finance Act, 1901: "As respects the first levying or repealing of any duty of customs . . . ., the time at which the importation of any goods shall be deemed to have had effect shall be the time at which the entry of the goods under the Customs Act is delivered. . . . ."

On June 30, 1925, the Finance Act, 1925, was passed, imposing as from July 1, 1925, Customs duties on all imported cinematograph films.

The suppliant, who was a producer of cinematograph films, was informed towards the end of June, 1925, that such duties would probably be imposed. He went to Berlin, where he had six films, which he packed in cardboard boxes. He took them to the railway station on June 29, 1925, and registered them through to Victoria Station, London. The suppliant and his wife travelled by the same trains and boat in which the films were conveyed. At Folkestone, in answer to the inquiry by the Customs officer whether he had anything to declare, the suppliant produced the registration receipt and pointed out the boxes of films, but the Customs officer said he had no authority to deal with them there and then. At Victoria Station, which was reached at 9.30 P.M. on June 30, after the latest hour for entry of goods, the films were detained on the ground that they were liable to forfeiture for non-entry. Later, the Customs authorities offered to waive the forfeiture on payment of the duty under the new Act to which they were liable if entered after June 30, but the suppliant declined to pay the duty. After correspondence and negotiations extending over several years, the suppliant claimed by petition of right the return of the films and damages for their detention:—

Held, that the films were not "baggage of passengers" within the meaning of s. 66 of the Customs Consolidation Act, 1876, but were merchandise, and not having been duly entered with the Customs on June 30, 1925, they were liable to the duty imposed by the Finance Act, 1925.

Decision of McCardie J., ante, p. 329, affirmed.

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BUCKLAND
v.
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APPEAL from a decision of McCardie J. on a petition of right.

The facts giving rise to the suppliant's claim are set out in detail in the report of the hearing before McCardie J., and are summarized in the headnote.

McCardie J. dismissed the petition of right, holding that the films in question were not "baggage of passengers" within s. 66 of the Customs Consolidation Act, 1876; that consequently they should have been entered, and not having been entered the Customs authorities were entitled to detain the films until the suppliant had duly entered them and had paid the appropriate duty thereon.

The suppliant appealed.

Claude Grundy and *Geoffrey Cameron* for the appellant. There was no obligation on the part of the appellant to enter the films, and as they arrived in this country before the duty on imported films became payable there was no justification for their detention by the Customs authorities. The railway company had accepted them as personal baggage, and consequently would have been liable for their loss: see per Cockburn C.J. in *Macrow* v. *Great Western Ry. Co.* (1) The Customs Consolidation Act, 1876, itself shows that the term "baggage of passengers" cannot be confined to what is required by the passenger for his personal use in travelling, for by s. 49 small parcels of bullion may form part of the "baggage of passengers," and if bullion may fall within this expression, why not films which have been carried by the railway company as part of the suppliant's baggage? Reliance is placed by the Customs authorities on certain regulations regarding imported articles, but as to these it is sufficient to say that they have no statutory force and are not binding on the subject.

Sir Boyd Merriman S.-G. and *Bowstead* for the Crown were not called upon.

SCRUTTON L.J. Mr. Grundy has said everything that can be said on behalf of his client, and has put the matters in dispute so clearly that it is not necessary to call upon the Solicitor-General.

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(1) (1871) L. R. 6 Q. B. 612, 618, 619.

The case arises in this way: some years ago, the appellant, Mr. Buckland, conceived the idea that he might do well for himself and the public by representing operas with the assistance of the cinematograph. How this was to be done I have not clearly grasped, but, as I gather, parts of the operas, stage settings, and the action of the crowd were to be represented by the film, while the principal parts were to be represented by persons who would sing, and I suppose there would be an orchestra, although I cannot help wondering how Mr. Buckland was to do this so as to make the performance attractive. When, for example, Lohengrin arrives drawn by a swan in the middle of a crowd of excited people, and there is a bewildered progress of the swan down the river, I have some difficulty in understanding how much was to be represented by the film and how much by singing.

Mr. Buckland made films of six operas, "The Merry Wives of Windsor," "Martha," "Lohengrin," "Cavalleria Rusticana," "Der Freischütz," and "Waffenschmied," expending on each, he says, large sums of money, and he claimed that they were worth 35,000*l.* to him. In 1925 these films were in Germany, and Mr. Buckland, having heard that there was a likelihood of a duty being imposed on the importation of films into this country, decided, almost at the last minute, to bring his films here so as to escape the proposed duty, and of course he was perfectly entitled to do so if he could. The duty in question was imposed by the Finance Act, 1925, on films imported on or after July 1, 1925. That duty became payable by virtue of s. 7, sub-s. 2, of the Finance Act, 1901, when the entry of the goods under the Customs Act was delivered. Therefore to escape the payment of duty on the films they must have been entered with the Customs authorities before midnight on June 30, 1925. What in fact happened was this: Mr. Buckland and his wife travelled from Berlin by train to come to England, bringing with them the six films weighing about 2 cwts., these having been registered at Berlin for carriage to Victoria Station, London. On the arrival of the steamer at Folkestone a Customs officer came on board and asked passengers if they had anything to declare. Mr. Buckland mentioned that he had the films with him, but the officer said that he had no authority to deal with them there and then. The films then went on by the train to Victoria. Mr. Buckland did not go on then by the train, but Mrs. Buckland did, and on arrival of the train at Victoria the films were put on the Customs platform. The Customs officer who dealt with passengers' baggage took the view that the films were not passengers' baggage but were merchandise. In forming this opinion he was acting upon directions from the Commissioners of Customs, and the report that he made at the time to the King's warehouse to which theoretically he sent the films was in these terms: "I have this day detained six packages registered from Berlin Nos. 162 and 163 said to contain films being merchandise imported by Mrs. Buckland for the Grand Opera Photo-Play Company of 6A George Street, Edinburgh." It was quite obvious that the Grand Opera Photo-Play Company was not the passenger; the films were imported for that company. According to the Customs directions, merchandise, if it comes with a passenger, is not dealt with by the ordinary Customs officials as passengers' baggage but is dealt with by a higher official. The Customs House hours finish at 5 o'clock P.M., and merchandise arriving after that hour is not then dealt with, and consequently the films in question, which arrived at 9.30 P.M., had to wait till the following morning for a superior officer to deal with them. It thus appeared that the films did not go through the Customs until the duty had become payable.

I do not state in detail what happened afterwards, but Mr. Buckland took rather an obstinate line. He was offered the opportunity of having the films sent back to Germany without paying any duty; he was offered a remission of the fine which was payable under the regulations, but he stood on what he considered his rights, and he demanded that he should have his films brought in free of duty as ordinary passengers' baggage which arrived at Victoria on June 30.

On these facts I say two things: first, that there is no ground for suggesting that what was done was a dodge or pretence on the part of the Customs officers; they were merely carrying out the ordinary regulations which had been made, and without any reference to this particular case. Secondly, if Mr. Buckland, who was claiming originally in his petition of right 35,000*l.*, had acted reasonably he could easily have avoided such damage as accrued by paying the duty.

The position under the statute is this: prima facie the Customs Consolidation Act, 1876, deals with all goods, some of which are liable to duty and some not, but whether these are liable to duty or not, they, or practically all of them, have to be entered and go through the Customs. Sect. 64 says this: "The importer of any goods not subject to duties of Customs, or his agent, shall deliver to the collector or other proper officer an entry of such goods in the form No. 5 in Schedule B to this Act, and containing the several particulars indicated in or required thereby, or in such other form and manner as the Commissioners of Customs may direct." One would expect to find in that section, if anywhere, any exception to this general rule; but we have to pass to s. 66, which in my view is one of the oddest bits of drafting I have ever seen. It deals with two matters: first, with things that have been concealed, and with these it deals in the first sentence: "If any goods or other things shall be found concealed in any way or packed in any package or parcel to deceive the officers, such package or parcel, and all the contents thereof, shall be forfeited." The section also says: "but if any prohibited or uncustomed goods shall be found concealed therein, either before or after landing, the same shall be forfeited, together with everything packed therewith." That is one subject-matter. The section also states what might more appropriately have appeared in s. 64: "and if any goods be taken or delivered out of any ship or out of any warehouse, not having been duly entered,

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the same shall be forfeited." That is something quite distinct from the concealment matter. Then comes this proviso: "Provided always, that no entry shall be required in respect of the baggage of passengers." If these films were the baggage of a passenger they need not be entered; if, on the other hand, they were not passenger's baggage, they had not been duly entered and the procedure contained in the regulations was properly followed. So we get to this question: were the films passenger's baggage? A person, on being asked to define an elephant, said that he was unable to do so, but he knew an elephant when he saw it. So I find it difficult to define baggage of a passenger, but I know what is not when I see it, and I am clear that these films were not passenger's baggage. Some light on the matter is obtained from the descriptions and definitions in the regulations, and although I agree with Mr. Grundy that these regulations are not statutorily binding, I think that they are good sense. When there is in baggage something which is liable to duty the regulations provide what is to be done. The Commissioners instruct the officers that they may give a concession to private effects—namely, articles imported by their owner on his person or in his luggage or with his household belongings which are intended for his own private use or enjoyment, and there are these definitions: "The term 'personal effects' means any used portable articles imported in baggage, or on the person of a passenger or seaman, which he might reasonably be expected to carry with him for his own regular and private use. The term 'household effects' means any used furniture and any articles of ordinary and domestic use (including the personal effects of individual members of the household) removed collectively on a transfer of residence to this country." These definitions give a good idea of what is to be treated as "passengers' baggage." On the other hand, supposing the articles which are said to be baggage of passengers are obviously merchandise and are not brought in for the personal use of the passenger or his family, but are brought in for commercial purposes, as, for instance, if a man imported

1000 sheets, no one would say that they were passengers' baggage. To say that they were would be the same as if a person imported a dozen barrel-organs, which would obviously be imported for sale or for letting out for hire, and not for the passenger who brought them. So these films for representing operas were not brought here for the private pleasure of Mr. Buckland; they were brought for commercial purposes, and I am quite clear that they do not come within the expression "baggage of passengers."

I agree with Mr. Grundy that numerous cases which appear in the judgment of McCardie J., not all of which owe their presence there to the industry of counsel, have little to do with the question we have to decide. Transit of goods by railway and questions of liability in connection therewith raise different problems from those arising out of articles imported into England. I get no assistance from those cases, and in my view, when we arrive at the fact that the films are merchandise and not baggage of passengers, then we can only say that the proper course has been pursued by the Customs authorities. Merchandise may come in at any hour of the day or night, and if it arrives after Customs House hours and at the last minute it must wait till the office hours begin again, and then the proper formalities must be gone through under the provisions of the Customs Consolidation Act, 1876.

For these reasons I come to the conclusion that as Mr. Buckland's films were not properly through the Customs House until July 1 they became liable to duty. The appeal must be dismissed.

GREER L.J. I have come to the same conclusion, not, however, without having encountered some difficulties on the way. The question for determination may be simply stated thus: Were the six parcels of films which arrived at Victoria on June 30, 1925, liable to duty under the Finance Act, 1925, which imposed duties on goods entered after June 30, 1925? The answer to that question depends upon whether the films were merchandise within s. 65 or were baggage of passengers within the proviso to s. 66 of the Customs Consolidation Act, 1876. At first sight on reading s. 65 the words seem not very appropriate to any kind of small parcel of goods coming with a passenger which he purports to bring as part of his baggage; the language seems to be directed to goods which appear in a ship's manifest, in which case there is an obligation not merely on the importer but also on the ship to take the necessary measures required by the section to enable them to be properly imported. Sect. 66, however, provides that: "If any goods or other things shall be found concealed in any way or packed in any package or parcel to deceive the officers, such package or parcel, and all the contents thereof, shall be forfeited; and if any goods be taken or delivered out of any ship or out of any warehouse, not having been duly entered, the same shall be forfeited: Provided always, that no entry shall be required in respect of the baggage of passengers, which may be examined, landed, and delivered under such regulations as the Commissioners of Customs may direct, but if any prohibited or uncustomed goods shall be found concealed therein, either before or after landing, the same shall be forfeited, together with everything packed therewith." At first sight that seems to be a provision intended to be applicable to cases in which a passenger might bring goods in the ordinary way under a bill of lading to a consignee, or goods which have been landed by the ship's agent to consignees; but on consideration I have come to the conclusion that that is not the real meaning of the sections and that the proviso in s. 66 referring to the baggage of passengers relates only to that which can properly be called part of the baggage of passengers, and does not apply to that which accompanies a passenger and which is in fact merchandise imported not as part of his baggage but for purposes other than his personal use. Although the position is a little unfortunate, Mr. Buckland was too late in getting his films into this country to escape the duty imposed by the Finance Act, 1925.

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SLESSER L.J. I have come to the same conclusion, but with some difficulty, caused principally by the language of ss. 65 and 66 of the Customs Consolidation Act, 1876. I have been impressed by this consideration that in so far as a failure to enter goods under s. 66 may lead to forfeiture and at the same time it is provided that, in respect of passengers' baggage, there is no obligation to enter it, it puts upon a person importing goods into this country a considerable burden in deciding whether goods have to be entered or not; this depending upon whether the particular articles are or are not passengers' baggage. Nevertheless the Legislature has so enacted, and I have come to the conclusion that the films in question cannot properly be called "baggage of passengers." I notice that in the proviso to s. 66 it is said "that no entry shall be required in respect of the baggage of passengers," and then come these words: "but if any prohibited or uncustomed goods shall be found concealed therein, either before or after landing, the same shall be forfeited, together with everything packed therewith." I read that as producing this result, that the obligation under the earlier part of s. 65 that goods, generally speaking, must be the subject of entry applies where the baggage of passengers has merchandise in it. I cannot think the obligation to enter can be avoided by concealing the goods within the baggage of passengers. If that be so the conclusion follows that "baggage of passengers" must be read in the narrow sense as meaning that which is accessory to the reasonable requirements of the passenger *en route*, and not as including merchandise within that baggage. In the present case there is no question of merchandise being concealed in the baggage; there was no concealment and the whole parcel was one kind of merchandise—films. This is not the case of goods being placed within the ordinary baggage of passengers; it was a separate and independent parcel; but that separate and independent parcel would have had to be entered if it was contained in a passenger's portmanteau; a fortiori, it must be entered when it appeared by itself not concealed in passengers' baggage. I come to the conclusion that the obligation to enter the films was imposed by s. 65, and it was owing to the failure to enter them that the consequences complained of necessarily followed.

Appeal dismissed.

Solicitors for the appellant: *Gordon Gardiner, Carpenter & Co.*

Solicitor for the respondent: *Solicitor for Customs.*

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THE KING *v.* ASSESSMENT COMMITTEE FOR NORTH-EASTERN ASSESSMENT AREA OF SURREY.

Ex parte F. W. WOOLWORTH AND COMPANY, LIMITED.

Rating—Borough—Valuation List—Proposal by Occupier to Amend—Objection by Rating Authority—Hearing by Assessment Committee—Presence of County Valuation Officer—Decision—Validity—Certiorari—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 18, *sub-ss.* 1, 2, 3; *s.* 27; *s.* 37, *sub-s.* 7; *s.* 55, *sub-s.* 1; *Fourth Schedule, Part III., cl.* 4.

Where a proposal made under the Rating and Valuation Act, 1925, by the occupier of premises in an assessment area of a county to amend the valuation list in respect of the premises, comes before the Assessment Committee for the area, the county valuation officer, as having a possible interest, is disqualified from being present with the committee while they are hearing the proposal or considering their decision, and if he has been so present a writ of certiorari will be granted to bring up and quash the decision.

ORDER NISI for a certiorari.

On September 18, 1931, Messrs. F. W. Woolworth & Co., Ld. (hereinafter called "the applicants"), made a proposal under s. 37 of the Rating and Valuation Act, 1925, to amend the current valuation list for the borough of Kingston-upon-Thames in the North-Eastern Assessment Area of the county of Surrey, in respect of premises occupied by them therein—namely, Nos. 10–13 Market Place, Kingston-upon-Thames, by reducing the aggregate gross value thereof from 1996*l.* to 1750*l.* and the rateable value from 1662*l.* to 1455*l.* On

September 29, 1931, the corporation of the borough, who were the rating authority for the borough, gave notice of objection to the proposal.

On June 20, 1932, a meeting took place of the Assessment Committee for the North-Eastern Assessment Area of the county, before which the proposal came for hearing, the applicants being represented by Mr. W. S. Mercer, a member of the firm of Mercer, Adams & Mercer, of London, rating surveyors, and the rating authority being represented by Mr. R. N. Thatcher, their assistant rating officer.

During the hearing of the proposal and objection Mr. W. F. Lake, the valuation officer of the county valuation committee for the county of Surrey, sat with the Assessment Committee, and questioned both Mr. Mercer and Mr. Thatcher, and he afterwards remained with the committee while they were considering their decision in private.

The decision of the committee was that the proposal should not be allowed and that the valuation list should be confirmed.

On July 15, 1932, the applicants obtained an order nisi calling upon the Assessment Committee to show cause why a writ of certiorari should not issue to them to remove into the High Court their decision upon the grounds that in permitting Mr. Lake, the valuation officer of the county valuation committee, to take part in the hearing of the proposal and to be present while the committee were considering their decision and to take part in their deliberations thereon the committee acted contrary to the laws of justice and to the Act of 1925, and without or in excess of their jurisdiction.

In support of the application an affidavit was made by Mr. Mercer, in which he stated the facts mentioned above, and further alleged that he opened his case, stating the grounds in support of the proposal, and then answered questions put to him by way of cross-examination by Mr. Thatcher; that Mr. Lake then asked him questions, indicating that in his opinion the proposal was ill-founded; that believing Mr. Lake to be a member of the committee he answered them; that at the request of the chairman, Mr. Thatcher and he (deponent) retired while the committee considered their decision; that Mr. Lake remained with the Assessment Committee and was still there when they (Mr. Thatcher and deponent) were recalled and informed by the chairman that the proposal would not be allowed; that while the committee were considering their decision he (deponent) discovered for the first time who Mr. Lake was; that he was further informed that about August or September, 1931, Mr. Lake had urged that the gross value of 1996*l.* for the hereditament was insufficient and should be increased; that on returning to the room he (deponent) protested against Mr. Lake taking part in the hearing of the proposal and particularly in its determination, and asked what right he had to do so; that Mr. Lake said something which he (deponent) could not hear about sections of the Act of 1925, and as the next proposal was called on he (deponent) withdrew; and that before the hearing no intimation had been given by the county valuation committee of their intention to appear in opposition to the proposal as required by the proviso to s. 18, sub-s. 3, of the Act of 1925.

In opposition to the application an affidavit was made by Mr. W. F. Lake, the county valuation officer, in which he stated that he was present at the meeting of the Assessment Committee at which they considered the proposal of the applicants; that the county valuation committee did not desire either to oppose or to support the proposal; that he was not a witness in the case, that he was never employed as a valuer by the Assessment Committee, and that he had neither advised upon the case nor in any way assisted the Assessment Committee prior to the hearing to deal with it; that since his appointment he had always been present at the hearings by the Assessment Committee of contested proposals and objections, and had stayed throughout the proceedings, discussions in private included, except where the county valuation committee had made a proposal or an objection or had given notice of intention to appear in opposition to a proposal or objection, and that in each of these cases he had withdrawn while the Assessment Committee considered their decision in private; that to his personal knowledge the same course was followed by four of the five assessment committees in Surrey, that he was informed that it was also the practice in some other counties for the county valuation officer to remain with an assessment committee throughout the whole of its proceedings, except where the county valuation committee appointing that officer had made a proposal or an objection or had given notice of intention to appear in opposition to a proposal or objection, and that the present was the first occasion upon which any party had objected that he ought not to have been present during the consideration in private of a decision; that during the hearing of the proposal he questioned both Mr. Mercer and Mr. Thatcher in an endeavour to elicit for the information of the Assessment Committee the bases of their respective values, that at the time he had not formed any opinion as to the correctness or otherwise of the assessment under review, that he had not then nor had he yet valued or inspected the hereditament, and it was untrue that he then thought the proposal ill-founded; that at the conclusion of the hearing Mr. Mercer and Mr. Thatcher withdrew, and that he remained in the room while the committee considered its decision; that he listened to the discussion, but took no part in the committee's deliberations and was asked no questions, and that the committee came to its decision without any help or advice from him and without referring to him; that when Mr. Mercer and Mr. Thatcher had been recalled the decision was announced to them, that Mr. Mercer then asked why he (deponent) had been allowed to stay in the room, that he (deponent) referred him to s. 27 of the Act of 1925, and the clerk also referred him to the Fourth Schedule, Part III., cl. 4, of that Act, that on receiving that information Mr. Mercer departed apparently satisfied; that he had never expressed the view that the hereditament was undervalued or urged that its valuation should be increased, that some months previously the matter had been mentioned to him, but he had declined to express any opinion upon it.

An affidavit was made by Mr. R. N. Thatcher, the assistant valuation officer to the corporation of the borough, which was also the rating authority therefor, in which he stated that he attended the hearing of the proposal in question on behalf of the rating authority; that Mr. Mercer stated his grounds in support of the proposal, and after asking him some questions he (deponent) stated on behalf of the rating authority the case against the proposal, and Mr. Lake then asked him a considerable number of questions and also questioned Mr. Mercer as to the basis of the latter's valuation; that Mr. Mercer and he (deponent) then withdrew whilst the committee considered its decision, that while they were waiting outside the room Mr. Mercer asked him and he informed Mr. Mercer who Mr. Lake was and what position he held; that so far as he (deponent) was aware Mr. Lake had never held or expressed the opinion that a gross value of 1996*l*. for the hereditament was insufficient; that after the announcement of the decision of the Assessment Committee to confirm the list Mr. Mercer inquired by what authority Mr. Lake remained with the committee in private while they considered their decision, that he heard Mr. Lake refer him to s. 27 of the Act of 1925, and the clerk drew his attention to the Fourth Schedule, Part III., cl. 4, thereof, and that upon his question being answered he left apparently satisfied with the replies.

An affidavit was made by Mr. G. W. Franklin Bates, in which he stated that he had since December 1, 1930, been chairman of the Assessment Committee, and that he was present at the meeting of the committee when the proposal in question was considered; that during his time as chairman it had always been the practice for the county valuation officer to be present throughout the proceedings, discussions in private included, of the Assessment Committee, except where the county valuation committee had made a proposal or an objection or had given notice of intention to appear in opposition to a proposal or objection, in each of which cases he had been required to withdraw while the Assessment Committee considered its decision in private; that during that time he had himself presided over nineteen meetings at which the Assessment Committee had determined a total of 961 contested proposals and objections without any question being raised by any party as to the legality or propriety of the practice; that both Mr. Mercer and Mr. Thatcher were asked by himself (deponent) and other members of the committee, and also by Mr. Lake, a number of questions, all of which they answered; that Mr. Mercer and Mr. Thatcher thereupon withdrew while the committee considered its decision, and that Mr. Lake remained in his seat; that during the absence of Mr. Mercer and Mr. Thatcher, Mr. Lake took no part in the committee's deliberations, nor was he asked any question, and that the committee came to its decision to confirm the assessment without any reference whatsoever to him; that on the return of Mr. Mercer and Mr. Thatcher the decision of the committee was announced; that after the announcement Mr. Mercer asked why Mr. Lake was allowed to remain while the committee considered its decision in private, that he (deponent) heard his question answered by Mr. Lake and by the clerk, and that he (Mr. Mercer) left the room to all appearance satisfied with their replies; and that Mr. Lake was not employed by the Assessment Committee to make a valuation of the hereditament or asked at any time to express any opinion as to its value, nor had he been employed by the Assessment Committee as a valuer.

R. M. Montgomery K.C. and *W. B. Manley* showed cause. The order nisi for a certiorari should be discharged.

The presence of Mr. Lake, the county valuation officer, at the hearing by the Assessment Committee of the applicants' proposal and the part taken by him in the proceedings were not irregular and did not invalidate or in any way impair their decision on the proposal. It appears from the provisions of the Rating and Valuation Act, 1925, that one of its aims is to maintain a close connection between the county valuation committee, including its officers, and the assessment committee of each area in the county. Sect. 18 of the Act provides (sub-s. 1) that there shall be established in every county a county valuation committee consisting of members of the county council and of a representative of the assessment committee for each assessment area in the county; (sub-s. 2) that it shall be the duty of the county valuation committee to assist assessment committees in the performance of their functions, and for that purpose to hold conferences with persons representing assessment committees; and (sub-s. 3, as extended by s. 37, sub-s. 7) that a county valuation committee may appear as a party to any objection or proposal made to the assessment committee in respect of the draft valuation list, subject as therein provided. Sect. 27, sub-s. 1, as extended by s. 37, sub-s. 7, provides that the assessment committee shall hold meetings for considering any objections or proposals to the draft list, and that the objector, the rating authority, the county valuation committee, and the occupier shall be entitled to appear and to be heard. In the present case the county valuation committee did not avail itself of its right under these last provisions to appear before the Assessment Committee. Sect. 38, sub-s. 1, provides that the county valuation committee may employ a competent person to give advice or assistance in connection with the valuation of any hereditaments in their area, and specifies his powers; and s. 55, sub-s. 1, provides that the county valuation committee may appoint for the purposes of the Act valuation officers. Mr. Lake, the Surrey valuation officer, was appointed under the latter provision, and he had therefore general powers for the purposes of the Act, including power to advise or assist regarding the valuation of the premises in question, and it was not necessary to proceed under the former of these provisions to appoint a person for that particular purpose. The Fourth Schedule, Part III., cl. 4, of the Act provides that no person, being either a party to the objection, or a witness in the case, or a valuer employed by the assessment committee, shall be present while the assessment committee are considering their decision on an objection. In that clause the county valuation officer is not included among the persons mentioned, and it would thus seem that, according to the maxim "expressio unius exclusio alterius," he is not thereby prohibited from being present while the assessment committee are considering their decision, at least in cases to which the county valuation committee is not a party. It is not contended that the county valuation officer has a right to be present at any meeting of an assessment committee held for the consideration of a proposal or objection made or opposed by the county valuation committee, or, in other words, for the consideration of any case to which the last-mentioned committee is a party. Neither is it contended that the county valuation officer has any right to take part in the deliberations of the assessment committee regarding their decision. It is submitted, however, that in any case to which the county valuation committee is not a party, the county valuation officer may sit with the assessment committee even up to the time when they give their decision, provided that he takes no part in the proceedings after they begin to deliberate regarding their decision. The presence of the county valuation officer at the meetings of the various assessment committees is of considerable practical advantage. It tends to assist the county valuation committee in discharging the duties which the Act imposes upon them of promoting uniformity in the principles and practice of valuation and assisting assessment committees in the performance of their functions. It is also of advantage to the assessment committee, as it enables that body to obtain the expert assistance of the county valuation officer at any time during the proceedings. The practice in this and other assessment areas has always been that, in cases to which the county valuation committee is not a party, the county valuation officer should sit with the assessment committee, giving his assistance, if desired to do so, up to the time when the committee begin to deliberate as to their decision, but not afterwards. In the present case Mr. Lake, the county valuation officer, acted consistently with the law and the established practice, having been present with the Assessment Committee without taking any part in their proceedings after they had begun to deliberate.

Michael E. Rowe in support of the order nisi. The order nisi for a certiorari should be made absolute.

Owing to the presence of Mr. Lake, the county valuation officer, during the consideration of the applicants' proposal, the decision thereon of the Assessment Committee should be set aside. The Rating and Valuation Act, 1925, does not empower the county valuation officer to be present with the assessment committee at their proceedings. The Act provides by s. 18, sub-s. 2, that the county valuation committee shall have power to hold conferences with persons representing assessment committees for the purpose of assisting these committees in the performance of their functions, and if the county committee held a conference of that kind its valuation officer could no doubt be present as its representative, but here no conference of that kind was being held. Sect. 27, sub-s. 1, as extended by s. 37, sub-s. 7, provides that the assessment committee shall hold meetings for considering a proposal or objection, and that certain specified persons—namely, the objector, the rating authority, the county valuation committee, and the occupier shall be entitled to appear and to be heard. As these provisions do not mention the county valuation officer, they in effect prevent him from being present at a meeting of the assessment committee, except where the county valuation committee is a party, and he appears as their representative. Sect. 38, sub-s. 1, empowers the assessment committee to employ a competent person to give advice or assistance in connection with the valuation of any hereditaments in their area, and that provision implies that they are not to obtain expert advice and assistance of that nature in a roundabout manner as by consulting the county valuation officer. It does not appear that it is a general practice that the county valuation officer should be present with the assessment committee at the hearing and decision of proposals and objections. The evidence only shows that the practice has been permitted by four out of five of the assessment committees of Surrey and by a few other assessment committees; and these assessment committees in allowing the practice exceeded their powers.

In the present case, Mr. Lake, the county valuation officer, was not qualified to take the part which he took in the hearing and decision by the Assessment Committee of the proposal in question. He was not qualified to sit with the justices at the hearing of the proposal or to remain with them while they were considering their decision. From his position as county officer he might well have been suspected by the ratepayers as being an interested party. It cannot be supposed that he sat and afterwards remained with the Assessment Committee except in order to be in readiness to assist them in arriving at their decision. Though he took no part in the committee's deliberations, he might have done so if called upon. In a case like the present, in which it is sought to set aside the decision of a tribunal on the ground that a person who took part in it was disqualified, the Court will not inquire what part that person actually took in the matter, but if it finds that he was disqualified it will quash the conviction: *Reg.* v. *Meyer* (1); *Reg.* v. *Great Yarmouth JJ.* (2) By appearing at the meeting of the Assessment Committee and examining witnesses, Mr. Lake in effect made himself a party to the case, and therefore by Fourth Schedule, Part III., cl. 4, of the Act, he was not entitled to be present while the Assessment Committee were considering their decision. It was not consistent with Mr. Lake's duty to his employers, the county valuation committee, that he should assist the Assessment Committee.

LORD HEWART C.J. In my opinion this order nisi should be made absolute. I do not question any statement contained in the affidavit of Mr. Lake, but it is undoubted that he was present while the Assessment Committee were considering their decision. The mere fact that he was so present, though, no doubt, only for the purpose of obtaining information which might be of use to him in his general capacity as county valuation officer, is enough to invalidate these proceedings of the Assessment Committee. There is no need to discuss the general principles, which are very familiar and are expressed in the cases to which our attention has been directed. I see no escape from the conclusion that there should be an order absolute for a certiorari.

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(1) (1875) 1 Q. B. D. 173.

(2) (1882) 8 Q. B. D. 525.

AVORY J. I am of the same opinion. I think that Mr. Lake, being in the position of county valuation officer, might reasonably be suspected by ratepayers and persons appearing before the Assessment Committee of having a real bias in regard to a question of the valuation of premises within the county. I cannot doubt that, if in a particular case any difference of opinion arose in the Assessment Committee, they would refer to the county valuation officer, if present, for his advice and assistance. The mere fact that he did not in the present case tender any advice or assistance is clearly shown by the authorities not to be sufficient of itself to get rid of the disqualification.

BRANSON J. I agree.

Order absolute with costs.

Solicitors: *Durham, Charlton, Carn & Shelly, London and Kingston-upon-Thames; Neve, Beck & Crane.*

J. R.

GRUNDY *v.* HEWSON.

1933
March 14,
15.

Landlord and Tenant—Agricultural Holding—Rent—Determination by Arbitration—Enforcement of Award—Award as to Rent for Period ended Five Months previously—Agricultural Holdings Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 9), *s.* 12, *sub-s.* 3.

On January 16, 1929, the tenant of an agricultural holding made to the landlord a demand in writing for arbitration under the Agricultural Holdings Act, 1923, as to the rent to be paid for the holding as from April 6, 1930, the next ensuing date at which the tenancy could have been terminated by notice to quit given by the tenant at the date of the demand for arbitration. The landlord consented to the matter being referred to arbitration, but after a long delay, due to the fault of the landlord and his advisers, he refused to concur in the appointment of an arbitrator, to take part in the arbitration, or to recognize the award. At the request of the tenant the Minister of Agriculture appointed an arbitrator who, on September 23, 1931, made an award fixing a reduced rent for the holding as from April 6, 1930:—

Held, that the award was good and enforceable as between the parties.

Appeal from Louth County Court.

By a tenancy agreement dated September 16, 1928, the landlord, James Grundy, let to the tenant, George Hewson, a farm situate at Yarborough, Lincolnshire, to hold the same from April 6, 1928, for the term of one year, and so on from year to year until the tenancy should be determined on twelve calendar months' notice in writing given by either party at the end of the first or any subsequent year, at the yearly rent of 145*l.*, payable half-yearly.

On January 16, 1929, the tenant gave the following notice to the landlord: "I hereby demand, in accordance with the Agricultural Holdings Act, 1923 (1), that within fifteen days you agree that the question of rent to be paid for the farm at Yarborough held under you as from April 6, 1930, at which date the tenancy could be determined by twelve months' previous notice given by me, be referred to arbitration." On January 28, 1929, the landlord replied that he was "quite agreeable that this matter should be referred to arbitration."

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(1) By the Agricultural Holdings Act, 1923, s. 12, sub-s. 3: "Where the landlord of a holding refuses, or within a reasonable time fails to agree to, a demand made to him in writing by the tenant for arbitration under this Act as to the rent to be paid for the holding as from the next ensuing date at which the tenancy could have been terminated by notice to quit given by the tenant at the date of the said demand, and by reason of the refusal or failure the tenant exercises his power of terminating the tenancy by a notice stating that it is given for that reason, the tenant shall be entitled to compensation in the same manner as if the tenancy had been terminated by notice to quit given by the landlord. . . ."

Protracted attempts to come to an agreement regarding the rent, and also regarding the appointment of an arbitrator, having failed, and the landlord having taken up the position that, owing to the period of time that had passed, the agreement to submit the question of the rent to arbitration had lapsed, and that the whole proceedings must be started afresh, the tenant, on April 7, 1931, applied, under the Agricultural Holdings Act, 1923, Sch. II., to the Minister of Agriculture to appoint an arbitrator. The landlord objected, but the Minister appointed an arbitrator on May 18, 1931, to settle the question of "the rent to be paid for the said holding as from the next ensuing date at which the tenancy could have been terminated by notice to quit given by the said tenant at the date of the demand for arbitration."

The landlord contended that the arbitrator had no power to make an award, on the ground that the Agricultural Holdings Act, 1923, did not give an arbitrator power to fix rent for a date that was passed, and that the notice requiring the landlord to concur in appointing an arbitrator was out of time. When the arbitrator indicated his intention of proceeding with the arbitration, the landlord's solicitors gave notice that the landlord would not take part in it, and would decline to recognize the award.

On September 22, 1931, the Minister of Agriculture extended to October 5, 1931, the time for making the award.

On September 23, 1931, the arbitrator made his award, reciting the terms of reference, and determining "that the rent payable by the said George Hewson to James Grundy, the landlord of the said farm, shall be 111*l.* 19*s.* per annum."

The tenant paid 111*l.* 19*s.* as the rent for the farm for one year as from April 6, 1930, but the landlord refused to accept the award, and brought an action in the county court claiming 33*l.* 1*s.*—the difference between 145*l.* and 111*l.* 19*s.* —as the balance of rent due for the period in question. In defence, the tenant pleaded the award, and he counterclaimed from the landlord 8*l.* 15*s.* 6*d.*, being the landlord's proportion of the costs of the award. The county court judge found that the award was valid for the purposes of s. 12, sub-s. 3, of the Agricultural Holdings Act, 1923, but that that sub-section had the effect, not of abrogating, without the landlord's consent to the award, the terms as to rent agreed in a tenancy agreement, but in the event of the landlord's failure so to consent, of giving the tenant the right to give notice to quit without losing his right to compensation for disturbance. He therefore gave judgment for the landlord.

The tenant appealed.

Singleton K.C. (*T. F. Davis* with him) for the tenant. The county court judge was wrong. The award is binding on the parties. If a landlord agrees to go to arbitration under the Agricultural Holdings Act, 1923 (as the landlord here did), he cannot afterwards be heard to say that the rent is other than that fixed by the arbitrator.

[He was stopped.]

Aggs for the landlord. The award is not binding on the parties. First, it is bad because the notice by the tenant demanding the arbitration and the consent thereto by the landlord had lapsed by September, 1931, when the arbitration at length took place. Secondly, the award is bad because it purports to fix, in September, 1931, the rent as from April 6, 1930, an act to the prejudice of the landlord which the Agricultural Holdings Act, 1923, does not authorize. Thirdly, there is no provision in the Act for enforcing an award of this nature.

[ACTON J. referred to Sch. II. to the Act, para. 12, which provides that: " The award to be made by the arbitrator shall be final and binding on the parties . . . ."]

A tenancy agreement subsists until there is a surrender and a new demise.

[GODDARD J. That is so at common law, but a statute can provide for a variation of such an agreement without those steps being taken.]

The only effect of the arbitration is to give the tenant the right to give notice to quit without losing his right to compensation for disturbance under s. 12, sub-s. 1, of the Act if the landlord refuses to grant a new tenancy at the rent awarded.

ACTON J. [having stated the facts and said that there could be no question that there had been a valid submission to arbitration on the question what rent was to be paid for the farm as from April 6, 1930, and that it was abundantly clear that the award was intended to express the decision of the arbitrator as to what rent should be paid for the farm as from that date, continued:] Mr. Aggs first argued that the tenant's notice of January 16, 1929, demanding arbitration and the landlord's consent thereto of January 28, 1929, had lapsed before the arbitration was held in September, 1931. It is enough to say, with regard to that, that the very long delay between the submission to arbitration and the actual arbitration seems to be due entirely to the stolid attitude, which may fairly be described as one of "passive resistance," maintained throughout by the landlord and his advisers. It is also to be observed that the time for making the award was extended by the Minister of Agriculture. In these circumstances, I am at a loss to understand how it can be said that the tenant's notice demanding arbitration and the landlord's consent had lapsed. Clearly there was no lapse.

With regard to Mr. Aggs' second point—namely, that the landlord was unjustifiably prejudiced by the fixing by the arbitrator, in September, 1931, of the rent as from April 6, 1930, it is unnecessary to do more than again call attention to how that long delay came about. It is also clear that the landlord could have given notice that he intended to ask the arbitrator to increase the rent, and it may be that at the arbitration it would have been open to the landlord, without any notice given, to have contended that the rent should be increased instead of being reduced. I do not think that it can be contended that there was any hardship or prejudice affecting the landlord in what took place.

Lastly, Mr. Aggs said that the award is not enforceable, but is a nullity and mere waste-paper. That does not seem to be arguable. It is urged that there is nothing in the Act which enables the award to be enforced, and I am then left wondering what the word "enforced" in Mr. Aggs' argument means. The way in which it is used in the present action is that when the landlord claims rent on the old basis of 145*l.* a year, the tenant says: "No. Here is a valid and subsisting award, binding on us both, by which the rent to be paid as from April 6, 1930, is reduced to 111*l.* 19*s.*" That the award can be enforced in that way and for that purpose seems to me to be beyond argument. Having regard to the shape which the argument has taken I do not think it necessary to enter on a disquisition on the provisions of the Act nor to say more than that I am entirely unable to agree with that part of the judgment of the county court judge in which he decided that the award was not binding as between the landlord and the tenant.

GODDARD J. I agree. The pith of the county court judge's judgment is to be found in two sentences. In one he says: "Sect. 12, sub-s. 3, must be read as a whole and it only provides for the landlord agreeing voluntarily to a variation of rent as a result of an award, and in the event of such failure to agree, gives the tenant certain rights as to compensation." With all respect to the county court judge, I do not think that such is the true effect of the section. What gives the tenant a right to compensation after he has given notice to quit is not the failure of the landlord to agree to a variation of the rent as the result of the award, but the refusal of the landlord to go to arbitration. If the landlord refuses to go to arbitration, the tenant can give a notice to quit and still retain his right to compensation for disturbance. If the landlord agrees to go to arbitration, the tenant cannot, pending arbitration, give notice to quit, except on the terms that he loses his right to compensation. It cannot, therefore, be seriously argued that, where the landlord agrees to go to arbitration and the arbitrator fixes the rent, the landlord is free to disregard the award and tell the tenant that, if he wants a reduction of rent, he must, notwithstanding the award, give notice to quit, because, if that were so, the tenant would lose his right to compensation, the landlord having agreed to go to arbitration.

The other sentence in the judgment of the county court judge to which I wish to refer is this: "It [the Act] does not enact that the rent named in the award is to be the only rent which can be legally demanded." In my view, that is just what the section means. If either party, landlord or tenant, requires the revision of the rent, they can agree on one, but, if they do not do so, they are to go to arbitration to determine the rent to be paid for the holding as from the next ensuing date at which the tenancy could have been terminated by notice to quit given by the tenant at the date of the demand for arbitration. If the section does not provide for a statutory interferance with the contract of tenancy between the parties, I do not know what it means. In my opinion, the section provides that the rent may be fixed by the arbitrator and that, from the date indicated in the section, the rent fixed by the arbitrator is the only rent.

Appeal allowed.

Solicitors for tenant: *Ellis & Fairbairn.*

Solicitors for landlord: *Collyer-Bristow & Co., for Falkner, Son & Roberts, Louth.*

G. F. L. B.

WYATT *v.* KREGLINGER AND FERNAU.

[1932. W. 2620.]

K. B. D.
1932
July 28, 29.
C. A.
1933
Feb. 7.

Restraint of Trade—Grant of Pension by Employers to Employee—Stipulation that Recipient of Pension was not to enter Wool Trade—No Covenant by Recipient of Pension—Acceptance of Pension on Terms stated—Action to recover Pension.

The defendants, on June 25, 1923, wrote to the plaintiff, who had been in their service for many years, a letter as follows: "Upon your retirement on 31st July next we have decided to grant you a pension of 200*l.* per annum, payable by monthly instalments. You are at liberty to undertake any other employment or enter into any business, except in the wool trade, and the only other stipulation we attach to the continuance of this pension is that you do nothing at any time to our detriment (fair business competition excepted)." The plaintiff's reply by letter was lost, but he must have said that he was entitled to three months' notice, because the defendants wrote on June 26: "Your letter to hand. I was unaware of the arrangement regarding three months' salary; consequently you will receive full salary until 30th September, and from that date remuneration at the rate of 200*l.* per annum, in accordance with the terms and conditions of our letter of yesterday." The plaintiff's reply to this letter was also lost. The defendants paid the plaintiff a pension or remuneration at the rate of 200*l.* a year from 1923 until 1932, but on April 1, 1932, they wrote to the plaintiff that the allowance of 200*l.* would be discontinued as from June 30 next. The plaintiff thereupon commenced an action claiming a declaration that upon the true construction of the letters of June 25 and 26, 1923, the defendants were liable to pay him a pension of 200*l.* a year upon the terms and conditions therein set forth. The defendants denied that any such agreement as alleged existed, and further, that if there was such an agreement it was void as being in restraint of trade.

Macnaghten J. held that the promise of the defendants contained in the two letters of June 25 and 26, 1923, to pay the plaintiff a pension or remuneration of 200*l.* a year was a gratuitous promise and gave rise to no legal obligation. On appeal:—

Held, that, assuming that a contractual obligation was created by the two letters, the contract was in restraint of trade and therefore void as being against public policy, notwithstanding that there was no negative covenant by the plaintiff that he would not enter into the wool trade, but merely a stipulation that if he did so he would forfeit the pension.

Per Scrutton L.J.: The letter of June 25 was a gratuitous promise creating no legal obligation.

Action tried before Macnaghten J.

The plaintiff, Mr. Henry Wyatt, who was seventy years of age, was formerly in the employment of the defendants,

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Fernau.

Messrs. Kreglinger & Fernau, a Belgian firm, which had been established over 120 years, with a head office in Antwerp and a branch office in London. The plaintiff was employed by the London branch of the defendant firm as manager of their import and export department at a salary of 400*l.* per annum and commission, and had been in their employment since 1914, when the defendant firm took over the business from a Mr. Kreglinger, who in his turn had taken over the business in 1900 from a Mr. Brunninghausen. The plaintiff had entered the employment of Mr. Brunninghausen in 1876, and had remained in his employment and that of his successors, Mr. Kreglinger and the defendants, down to 1923.

In 1923 the plaintiff retired from employment, and on the occasion of his retirement the defendants wrote to him the following letter, dated June 25, 1923 :—

"Dear Mr. Wyatt,—

Upon your retirement on 31st July next we have decided to grant you a pension of 200*l.* per annum, payable by monthly instalments.

You are at liberty to undertake any other employment, or enter into any business on your own account, except in the wool trade, and the only other stipulation we attach to the continuance of this pension is that you do nothing at any time to our detriment (fair business competition excepted).

Wishing you every happiness and success in the future.

We remain, yours sincerely,

Kreglinger & Fernau."

Mr. Wyatt replied to that letter in writing, but the original letter was lost, and Mr. Wyatt had no recollection of its contents ; but from the contents of a further letter written by the defendants on June 26 it was evident that Mr. Wyatt must have pointed out to the defendants that by the terms of his employment he was entitled to three months' notice.

The letter of June 26, 1923, from the defendants was in the following terms :—

"Dear Mr. Wyatt,—

Your letter to hand. I was unaware of the arrangement regarding three months' notice ; consequently you will receive full salary until 30th September, and, from that date, remuneration at the rate of 200*l.* per annum; in accordance with the terms and conditions of our letter of yesterday.

Your salary, as hitherto, will be paid free of income tax.

It will not be necessary for you to return to the office for duty, as we are making other arrangements regarding the rooms used by imports department.

You will, of course, have access to all books and papers relating to the Tres Puentes Company, Ld., and we will keep a special file for all papers, letters, etc., arriving during your absence.

Yours faithfully,
KREGLINGER & FERNAU."

It appeared from the correspondence that Mr. Wyatt must have answered that letter, though the actual contents of the letter were not known, because on July 2 the defendants wrote to him again :—

" Dear Mr. Wyatt,—

I am in recept of your letter of the 28th ultimo, for which I thank you.

Kindly note that you will be retaining the secretaryship of the Tres Puentes Co., Ld., until this company is liquidated.

Yours faithfully,
KREGLINGER & FERNAU."

Mr. Wyatt received his full salary down to September 30, 1923, and thereafter until 1932 he received from the defendant firm a pension or remuneration at the rate of 200*l.* a year by monthly payments of 16*l.* 13*s.* 4*d.*

On April 1, 1932, the defendants wrote to Mr. Wyatt the following letter :—

" Dear Mr. Wyatt,—

In going through the London figures my partners and myself were greatly surprised at finding that an allowance of 200*l.* was being paid to you at the London office, whereas very drastic steps have been taken of late to reduce the overhead expenses in London which had become unbearable in proportion to the present-day values of wool and produce.

After due consideration of the past services and of the present situation, we came reluctantly to the conclusion that this allowance should be discontinued as from 30th June next.

We believe that your situation is such that you can dispense with this allowance without feeling hardship, which many of our other London clerks are put to by reductions in the salaries or by discontinuance of employment. Will you please take note of our decision.

We remain, dear Mr. Wyatt, sincerely yours,

Kreglinger & Fernau."

Mr. Wyatt was very surprised on the receipt of that letter, because, according to his understanding of the matter, the pension or remuneration of 200*l.* a year was a payment which the defendants were bound to make, and to continue to make, to him during the continuance of his life. The defendants paid the monthly instalments of the pension for the months of April, May and June.

Mr. Wyatt on July 6 commenced this action, by which he claimed damages for the repudiation by the defendants of the agreement contained in the letters of June 25 and 26, 1923. At the trial the statement of claim was amended by adding an alternative claim for a declaration that upon the true construction of the letters of June 25 and 26, 1923, the defendants were liable to pay to the plaintiff by monthly instalments a pension of 200*l.* a year upon the terms and conditions therein set forth.

The defendants, who had by their defence denied that any contract for the payment of the moneys, the subject-matter of the action, ever existed, or that the plaintiff ever gave any consideration therefor, amended their defence at the same time by pleading that if it should be held that any contract of employment existed between the plaintiff and the defendants, as alleged by the plaintiff, the contract was terminable by a reasonable notice, and that such reasonable notice was given by the letter of April 1, 1932, and also that such alleged contract, if any, was void as being in restraint of trade.

St. John Field for plaintiff.

Comyns Carr K.C. and *R. Fortune* for defendants.

MACNAGHTEN J. [after stating the facts set out above, continued :] The question at issue in the action is, what is the true construction of the letters of June 25 and 26, 1923; whether the promise to pay what is in the first letter called a "pension" and in the second letter "remuneration" at the rate of 200*l.* a year by monthly payments was a gratuitous promise which gives rise to no legal obligation, or whether it was a promise made for good consideration and one which is therefore enforceable at law. The first letter begins: "Upon your retirement on 31st July next we have decided to grant you a pension of 200*l.* per annum, payable by monthly instalments." Standing by itself, that sentence seems to indicate that the promise was a gratuitous promise of an ex gratia payment. A contract requires the consent of two parties. The sentence begins "we have decided"—that is to say, the defendants have come to a decision of their own motion and without requiring any consent or obligation on the part of the plaintiff—"to grant you." The word "grant" is not far removed from the word "give"; it would be an appropriate word to use for the purpose of describing a voluntary payment made to a retiring employee or servant. And so with the word "pension": although a pension may be a payment to which the recipient has a contractual right, in many cases a pension is a payment made voluntarily and without any right on the part of the recipient to sue for it.

I will here notice an argument that was put forward by Mr. Comyns Carr that he did not understand from the statement of claim that the plaintiff was claiming that he was entitled to receive this 200*l.* a year for the rest of his life. I am disposed to think that when an employer says to an aged employee, "I will give you a pension," such a promise would be understood by most people to mean that the pension would continue for the rest of the life of the pensioner.

So far the first words of this letter on their true construction mean, I think, that the pension was a voluntary gratuitous pension which the defendants were free to give or withhold at their pleasure and discretion. But the letter contains a second paragraph which it is said shows that there were obligations undertaken by the plaintiff, that there was a consideration moving from him and that, under those circumstances, although the actual letter accepting the pension is lost, the fact that the pension was accepted on the terms set out in that letter does constitute a contract enforceable in law. The second paragraph is: "You are at liberty to undertake any other employment, or enter into any business on your own account, except in the wool trade, and the only other stipulation we attach to the continuance of this pension"—and there again the word "pension" is used—"is that you do nothing at any time to our detriment (fair business competition excepted)." With regard to the latter part of the sentence, the stipulation that the plaintiff was to do nothing to the detriment of the defendants, "fair business competition excepted," cannot amount to any consideration in law. With regard to the first part of the sentence, the permission thereby given to Mr. Wyatt to undertake any other employment, or enter into any business on his own account, is qualified by the words "except in the wool trade." I read those words as meaning that Mr. Wyatt is not, so long as he is in receipt of a pension, to enter into business in the wool trade. It seems to me that might be a good consideration in law, subject to the point made by Mr. Comyns Carr that it would be a covenant in restraint of trade. Mr. Comyns Carr says: Here is this gentleman undertaking—if the view is accepted that it is a contract—that he, at the age of sixty-one, will not ever enter into the wool trade in any part of the world. Such an agreement is obviously in restraint of trade; the public are going to be deprived of whatever advantages they might get from Mr. Wyatt entering the wool trade, and that agreement is on the face of it so wide as to be unreasonable, and is therefore void. It is not necessary for me to determine the matter on that argument, which will be available to Mr. Comyns Carr in the Court of Appeal, because the second paragraph of the letter of June 25 does not modify the opinion I have formed as to the meaning of the first paragraph—namely, that the pension was a voluntary gratuitous payment which the defendants were at liberty to give or withhold at any time at their discretion. I think the words: "You are at liberty to undertake any other employment, or enter into any business on your own account, except in the wool trade," are merely an intimation that they did not desire Mr. Wyatt to enter into the wool trade, and that if he did enter into the wool trade he must not expect them to continue the payment.

But it is said, quite rightly, that the construction of the letter of June 25 cannot be considered apart from the letter of June 26, and that the letter of June 26 assists the plaintiff in his view that this was a contractual obligation. Now, in the first place, it is to be observed that the defendants when they wrote the letter of June 25 (the writer was a Mr. Gibbs) were unaware of the plaintiff's right to three months' notice, and as soon as the plaintiff called attention to that fact the defendants at once agreed. Although they did not require Mr. Wyatt's services, and they were making other arrangements in their office, they agreed to give him his full salary for the three months. So far there is no ground for saying, and, indeed, it is not suggested, that this pension was granted in satisfaction of any obligation that the defendants might be under to Mr. Wyatt in respect of the contract of service which was at that time in force. It is clear that the defendants fully discharged all their obligations to Mr. Wyatt under that contract of service, and if any fresh contract was, as is suggested, made by these letters it was a new contract, separate and distinct from the contract of service under which he had been employed. Now the words of the second letter are: "I was unaware of the arrangement regarding three months' notice; consequently you will receive full salary until 30th September"—that is giving him the three months' notice—"and, from that date, remuneration at the rate of 200*l.* per annum, in accordance with the terms and conditions of our letter of yesterday." The word "remuneration" usually implies a payment for services rendered or to be rendered, and the promise of "remuneration" in accordance with the terms and conditions of our letter of yesterday" would seem to imply some obligation on the part of Mr. Wyatt. But the only obligation which can be got out of the letter of June 25 is an obligation not to enter the wool trade, and, as I have already said, I do not think it means in that letter, and, therefore, it cannot mean in the letter of June 26, anything but an intimation that the defendants do not wish Mr. Wyatt to enter into the wool trade, and that he must take note that if he does so they will not pay the pension. The other terms of the letter throw no light upon the matter. The conclusion I have come to is the one I have already expressed, that the defendants are free to give or to withhold this 200*l.* per annum to or from Mr. Wyatt at their discretion, and, therefore, in my view, the action must be dismissed with costs.

Judgment for defendants.

The plaintiff appealed. The appeal was heard on February 7, 1933.

Macaskie K.C. and *St. John Field* for the appellant. The judge was wrong in holding that there was no contract by the defendants to pay the pension of 200*l.* a year to the plaintiff, and that it was a mere voluntary payment on their part. The conditions attached to the grant of the pension in the letter of June 25 show that it was not a mere gratuitous promise on their part giving rise to no legal obligation. The plaintiff was to be at liberty to undertake any other employment, or enter into any business on his own account, except in the wool trade, and so long as he complied with those conditions he was entitled to receive the pension. The letter goes on to refer to the stipulations the defendants attached to the continuance of the pension. The word "stipulation" was considered in *Hill* v. *Fox* (1), where Wightman J. spoke of it as being synonymous with "agreement" and differentiated it from an "understanding," because it was difficult to say what an "understanding" meant. In the letter of June 26 the defendants referred to the "remuneration" at the rate of 200*l.* per annum, which the plaintiff would receive in accordance with the terms and conditions of their letter of June 25. Blackburn J. in *Reg.* v. *Postmaster General* (2) said: "I think the word 'remuneration' . . . . means a quid pro quo. If a man gives his services, whatever consideration he gets for giving his services seems to me a remuneration for them." Here the defendants said to the plaintiff that so long as he did not go into the wool trade they would pay him the pension of 200*l.* a year. There was a definite stipulation or condition, which the plaintiff might accept or not as he chose, preventing him from entering the wool trade on the terms that the defendants should grant him remuneration at the rate of 200*l.* a year. There was no discrimination in the letter of June 26 between the plaintiff's full salary and his subsequent remuneration. In *Bishop* v. *Kitchin* (3) a traveller covenanted not to solicit orders for any person but his employers in the West of England, South Wales, or any district whatsoever in consideration of a salary and an annuity. An action was brought for arrears of salary while in the defendants' service, and of annuity when he had left their service. The defendants demurred to the count for the annuity on the ground that the agreement set out was bad as in restraint of trade. The Court held that the agreement having been executed and the plaintiff having submitted to the restraint, he was entitled to recover the consideration due in respect of it. That case was commented on by Scrutton L.J. in *Evans (Joseph) & Co.* v. *Heathcote* (4), where he said that he did not understand how you can sue on a contract which is void in restraint of trade.

(1) (1859) 4 H. & N. 359, 364.
(2) (1876) 1 Q. B. D. 658, 663.
(3) (1868) 38 L. J. (Q. B.) 20.
(4) [1918] 1 K. B. 418, 437.

[SLESSER L.J. Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (1) said: "The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule."]

In the present case the stipulation that the plaintiff is to receive a pension so long as he does not enter into the wool trade does not amount to a covenant in restraint of trade. In *Whitwood Chemical Co.* v. *Hardman* (2) the manager of a manufacturing company agreed to give during a specified term the whole of his time to the company's business, and it was held by the Court of Appeal that in the absence of any negative stipulation in that behalf the company were not entitled to an injunction to restrain the manager from giving, during the term, part of his time to a rival company. The burden of showing that an agreement is not in restraint of trade is upon the covenantee who imposed the burden. There are special circumstances in this case which prevent this agreement from being in restraint of trade.

[SCRUTTON L.J. referred to *Morris (Herbert), Ld.* v. *Saxelby* (3) and to the third point laid down by Younger L.J. in *Attwood* v. *Lamont* (4), as established by the decisions of the House of Lords as follows: "An employer is not entitled by a covenant taken from his employee to protect himself after the employment has ceased against his former servant's competition per se, although a purchaser of goodwill is entitled to protect himself against such competition on the part of his vendor."]

The distinction between those cases and the present is that those covenants were contained in the contract of service, which is not the fact in the present case. The plaintiff does not bind himself that he will not enter the wool trade, there is merely a stipulation that if he does do so he will forfeit his pension.

(1) [1894] A. C. 535, 565.
(2) [1891] 2 Ch. 416.
(3) [1916] 1 A. C. 688.
(4) [1920] 3 K. B. 571, 589.

Comyns Carr K.C. and *R. Fortune* for the respondents were not called on.

SCRUTTON L.J. This is an interesting case and not very easy. The first and main point to be considered is what do four letters mean, two of which we have not seen (which is not a very promising start for any case), and when that particular point has been decided a question of general importance arises as to principle.

Now the position is this: The defendant firm which was very old-established, in the sense that it had carried on business under various names and various amalgamations for about 125 years, took into its service in 1900 the plaintiff, who had been serving for some twenty years previously with another firm which was amalgamated with the defendant firm. In 1923 the defendant firm, which had a London branch, found itself compelled to cut down its expenses. It had the right under its contract with the plaintiff to terminate his engagement on three months' notice, and it was under no obligation whatever to give him any pension. There was no contributory scheme to which the plaintiff had been contributing or having deductions made from his salary in relation to a pension, and the firm could, if they had wished, have given him three months' notice and dismissed him and he would have had no legal claim for any pension. But the defendant firm did not desire to take that attitude, and they wrote certain letters to the plaintiff, to which he wrote certain answers. He now says that the firm then contracted as a matter of law to pay him a pension, and that the firm has no power to withdraw that pension. The fact is that after paying the pension for some nine years, pecuniary circumstances again becoming difficult, the defendant firm withdrew the pension and alleged that there was no obligation on them to continue paying the pension.

Now the members of the Court are agreed as to the result, but they are not agreed as to all the grounds which have been argued before them. I take the same view as the learned judge below did. I am of opinion that these letters are not letters of contract; that is the view that the learned judge below has taken. My brothers do not agree with that view; they think that an agreement was thereby created. But the whole Court takes the view that if there is an agreement it is an agreement which the Court cannot enforce at the instance of either party to it, on the ground that it is contrary to public policy as being an agreement in restraint of trade.

First of all as to the construction of the letters. I think the Court is placed in a great difficulty when it has to find a promise and an acceptance giving legal results from four letters, and it has only seen two of the letters, the letters written by the plaintiff having been lost. The letters the Court has seen are these. One is a letter of June 25, 1923, written by the defendants to the plaintiff, as follows: "Dear Mr. Wyatt. Upon your retirement on 31st July next we have decided to grant you a pension of 200*l.* per annum payable by monthly instalments." Now the defendants were under no obligation whatever to pay him a pension, and the whole transaction seems to have begun with a voluntary, gratuitous offer on their part. There is no question of agreement. They say "We have decided." I start therefore with a letter which appears to begin not as a contract but as an intimation of an intention. The letter continues: "You are at liberty to undertake any other employment, or enter into any business on your own account." That does not look like contract; that is merely stating what is the present position, that when the plaintiff's contract of service is terminated he is at liberty to undertake any other employment or enter into any business on his own account. For the moment I leave out the next words, "except in the wool trade." I will come back to them, but I leave them out for the present. The letter continues: "The only other stipulation we attach to the continuance of this pension is that you do nothing at any time to our detriment (fair business competition excepted)." The view I take of that clause is that it is meaningless, it is too vague to form any part of a legal obligation. We have not seen the plaintiff's answer to that letter, but I infer from the next letter from the defendants that it was not an acceptance of the first letter. I think it is quite clear that the plaintiff in his reply said: "You cannot terminate my agreement summarily, as I am entitled to three months' notice," because the second letter of the defendants is: "I was unaware of the arrangement regarding three months' notice; consequently you will receive full salary until 30th September, and, from that date, remuneration at the rate of 200*l.* per annum"—the word "pension" is changed to "remuneration"—"in accordance with the terms and conditions of our letter of yesterday." There is nothing in the rest of the letter of any importance. Again we have not seen the plaintiff's answer to that letter. So that we have to find a contract from certain letters when all the letters on one side are absent. The next letter from the employers was on July 2, and was as follows: "Dear Mr. Wyatt, I am in receipt of your letter of the 28th ultimo, for which I thank you"—so that there was something which the employer thought he ought to thank the employee for—"Kindly note you will be retaining the secretaryship of the Tres Puentes Co., Ltd., until this company is liquidated."

Now the words on which special reliance is placed as showing there was a contract importing legal obligations are the words in the first letter: "You are at liberty to undertake any other employment, or enter into any business on your own account, except in the wool trade." The judge below has exactly expressed the view I take of these words, reading them in a letter which in my opinion starts by being a letter of a gratuitous offer imposing no legal obligation. The learned judge says: "The opinion I have formed as to the meaning of the first paragraph [is] that the pension was a voluntary gratuitous payment which the defendants were at liberty to give or withhold at any time at their discretion. I think the words: 'You are at liberty to undertake any other employment, or enter into any business on your own account, except in the wool trade,' are merely an intimation that they did not desire Mr. Wyatt to enter into the wool trade, and that if he did enter into the wool trade he

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must not expect them to continue the payment." That exactly expresses the view that I take of these words, coming as they do in a letter which starts with being an intimation of a gratuitous payment. It has to be borne in mind that not every formal proposal and acceptance constitute a legal contract. "Will you come to dinner on Tuesday?" "I have pleasure in accepting your kind invitation" constitute a proposal and acceptance, but no legal contract, because the parties never intended it to be a legal contract. I once had the pleasure as a judge of the King's Bench Division of hearing an animated dispute as to whether a particular gentleman was entitled to a prize under the terms of a golf competition held at the Devonshire Club at Eastbourne, and I decided—and no appeal was made against my decision—that no one concerned with that competition ever intended that there should be any legal results following from the conditions posted and the acceptance by the competitor of those conditions. I take the same view of these letters. I gather my brothers do not agree. We are each entitled to his own judgment.

Now comes the question, supposing there is an agreement and assuming it to be an agreement in the most favourable terms for the plaintiff, which is that it is not an agreement by him not to enter into the wool trade, but that it is an agreement by the employer to pay the plaintiff a sum if he does not enter the wool trade, I take the view that it is an agreement in restraint of trade, and further that it is a point which the Court takes because it relates to a matter of public policy, and the Court does not enforce arrangements which are contrary to public policy. Mr. Macaskie agrees that if it were an agreement by the plaintiff not to enter the wool trade for all time and all space it would be unenforceable, because it would be in restraint of trade, injurious to the public, and contrary to the principle laid down as to such contracts between employer and employee, as distinguished from contracts between a person selling a business and a person buying the business. The principle is stated at length, and justified by quotations from authorities, by Younger L.J.

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in his judgment in *Attwood* v. *Lamont* (1), in which Atkin L.J. concurred. Now this agreement, stated in the most favourable form for the plaintiff, namely a stipulation by the employer that he will pay the plaintiff so much a year if the plaintiff does not enter into the wool trade for the rest of his life in any part of the country or world, appears to me to be a contract in restraint of trade which is unenforceable just as much as a contract by the employee not to trade in the wool trade for the rest of his life in any part of the world, and that the country is thereby being deprived without any legitimate justification of the services of a man of sixty years of age who is quite competent to enter into business, because he is given leave to enter into any kind of business other than the wool trade. That I think is well within the principles stated in *Attwood* v. *Lamont.* (1)

For these reasons, dealing with the matter firstly as a question of the construction of the letters and, secondly, as a question of law, without any consideration of whether the employers ought or ought not to have continued the pension, I have come to the conclusion that the learned judge arrived at the right result, and that consequently the appeal must be dismissed.

GREER L.J. This case when it was before the learned judge who tried the case involved a question as to the true construction of certain documents that passed between the parties at the end of June and the beginning of July, 1923, and if the true construction of these documents was that there was an agreement between the parties, a further question whether that agreement was one which could be enforced at law or whether it was an agreement which was void as being in restraint of trade. Now I am inclined to take the view that the learned judge was wrong in the construction he put upon the documents, but we have not thought it necessary to call upon Mr. Comyns Carr in support of the view which commended itself to the learned judge, and, therefore, I do not feel that I am entitled to give any final decision on the question of the construction of the documents. I am, however, inclined to take the view that the document which settles the rights of the parties is a letter of June 25, 1923, from Messrs. Kreglinger & Fernau to the plaintiff, and that when they said they required, as it seems to me they required, two stipulations from Mr. Wyatt, they were thereby asking him to give them a legal promise in consideration of the pension they were offering. As I say, we have not heard Mr. Comyns Carr on that question and I do not express any final opinion upon it. But, assuming it is right that a contractual obligation was thereby created, then I take the same view as is expressed in the judgment of Scrutton L.J., that the agreement was in restraint of trade and not binding; that is to say, the promise on the part of Mr. Wyatt was a promise not to engage in the wool trade and not to do anything at any time to the detriment of his employers throughout the whole of his natural life at any place and at any time, and that, assuming he bound himself by such an agreement, he bound himself to something which was void in law, and inasmuch as the consideration was void the agreement would be altogether void. On those grounds I agree that this appeal should be dismissed.

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(1) [1920] 3 K. B. 571, 580.

SLESSER L.J. I agree that this appeal should be dismissed. I assume for the purpose of my judgment that Mr. Wyatt has proved to the satisfaction of the Court that there was created by the letters of June 25 and 26, 1923, a subsisting enforceable agreement between him and Messrs. Kreglinger & Fernau. I say I assume that for the purpose of what I have to say, because we have not heard Mr. Comyns Carr on the matter, and it may be that he might have been able to throw a light upon the case which would have led the Court to a contrary opinion. But assuming that to be the case one has to consider what is the nature of the alleged contractual relation between the parties? As I read it it is this, that Messrs. Kreglinger & Fernau would pay 200*l.* a year—described sometimes as a "pension" and sometimes as a "remuneration"—on certain stipulations: The material one is this:

"You," that is Mr. Wyatt, "are at liberty to undertake any other employment, or enter into any business on your own account, except in the wool trade." I think the effect of that is not that Mr. Wyatt undertakes that he will not enter the wool trade, but that it is made a condition of the receipt of the money that if he does at any time enter into the wool trade he is to forfeit any rights he might otherwise have under the agreement.

Now it has been argued for Mr. Wyatt that a distinction must be drawn between a case where a person has expressly covenanted to exclude himself, without limitation of time and space, from entering into a specified trade and a case where a person has agreed that a right which he would otherwise have would be defeated by his so entering into that trade. I cannot in principle find any distinction between the two agreements. The public policy which has to be considered, the interest of the community, seems to be affected quite as much by an agreement that a person will give up a benefit which he would otherwise receive if he enters into a particular trade, as it is by a direct agreement by him not to enter into that trade. In such matters it is well to go back to principle, and the principle is nowhere better stated than by Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt, &c., Co.* (1), where he says this: "All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void." It seems to me that to say to a man that he should be deprived of a benefit if he fails to restrain himself from entering into a particular trade, when such restraint would be a general restraint, is just as much contrary to public policy and deprives the public of his services as much as if he made an express covenant not to enter that trade. There is a passage, which is cited with approval by Younger L.J. in *Attwood* v. *Lamont* (2), from the judgment of James V.-C. in *Leather Cloth Co.* v. *Lorsont* (3), where the learned Vice-Chancellor

(1) [1894] A. C. 535, 565.
(2) [1920] 3 K. B. 571, 583.
(3) (1869) L. R. 9 Eq. 345, 354.

says: "Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labour, skill, or talent, by any contract that he enters into." That language, approved by Younger L.J., which I think is right, extends to any contract which has of necessity the effect of depriving a man of the liberty to serve the State by his labour or his skill. Of course it may well be that there are cases, irrespective of that consideration, where the restraint is so partial that it is not in the interests of the community that it should not be enforced, but to my mind it is quite clear, leaving aside that question, that the restraint in the present case is a restraint unlimited in time and space. It is not a restraint in consideration of the sale of a goodwill, such a case, for example, as Lord Macnaghten envisages in *Nordenfelt's* case (1), where he says: "What has the public to hope in the way of future service from a man who sells his business meaning to trade no more?" In the present case it is contemplated in the agreement itself that Mr. Wyatt will continue to carry on business, because there is an express provision that he is to be at liberty to undertake any other employment or enter into business on his own account but he must do nothing to the detriment of Kreglinger & Fernau, "fair business competition excepted." So this is a case where there is a general restraint imposed upon a person who otherwise, the agreement contemplates, might continue to serve the community in the wool business.

Finally, I desire to say a word about one authority which has been cited to us but which is not very easy to understand —namely, the case of *Bishop* v. *Kitchin*. (2) In the very short report of the decision of the Court, it appears to have been said, on an argument that the agreement was in restraint of trade, that the agreement having been executed and the plaintiff having submitted to the restraint he was clearly entitled to recover the consideration due in respect of it. I cannot think that that report adequately accounts for the decision of the Court. If the agreement were void it is very difficult to see how a party could found upon it. In the case of *Evans (Joseph) & Co.* v. *Heathcote* (1) Scrutton L.J. criticized *Bishop* v. *Kitchin* (2) as follows: "The case, as far as I can discover, has never been followed or doubted, but is cited in recent text-books without comment. If there were some account stated it would stand on the same footing as *Flight* v. *Reed* (3), the case under the usury laws; but in the absence of such an element I do not understand, with respect to the eminent judges who decided the case, how you can sue on a contract which is, in the language of Lord Halsbury in the *Mogul Steamship Co.'s Case* (4), 'void . . . . in restraint of trade: and contracts so tainted the law will not lend its aid to enforce. It treats them as if they had not been made at all.'" Respectfully I associate myself with the criticism of *Bishop* v. *Kitchin* (2) there stated by Scrutton L.J., and I do not think that that case, without more explanation than appears in the report, can be regarded any longer as an adequate authority.

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(1) [1894] A. C. 535, 567.

(2) 38 L. J. (Q. B.) 20.

Appeal dismissed.

Solicitors for appellant: *H. S. Wright & Webb.*
Solicitors for respondents: *Cochrane & Cripwell.*

(1) [1918] 1 K. B. 418, 437.
(2) 38 L. J. (Q. B.) 20.
(3) (1863) 1 H. & C. 703.
(4) [1892] A. C. 25, 39.

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MOTOR UNION INSURANCE COMPANY, LIMITED *v.* MANNHEIMER VERSICHERUNGS GESELLSCHAFT.

Insurance (Marine)—Contract of Reinsurance—Absence of Policy in Name of Reinsurers—Liability of Reinsurers—Stamp Act, 1891 (54 *&* 55 *Vict.* c. 39), *s.* 92, *sub-s.* 1; *s.* 93, *sub-ss.* 1, 3—*Marine Insurance Act,* 1906 (6 *Edw.* 7, *c.* 41), *ss.* 22, 23.

By a contract between the appellants, a German insurance company, therein described as the principals, and the respondents, an English insurance company, therein described as the agents, it was provided that marine insurance risks accepted on the English market by the respondents should be treated as having been accepted by them pro tanto on behalf of the appellants, the respondents issuing the policies in their own name and retaining a specified share of the interest therein for the appellants as undisclosed principals and the remaining share thereof for themselves. The respondents made a claim against the appellants for a certain sum as the appellants' proportion of the difference between premiums received and losses paid in respect of policies issued pursuant to the contract. The appellants relied by way of defence to the claim upon the provisions of the Stamp Act, 1891, ss. 92 and 93, and the Marine Insurance Act, 1906, ss. 22 and 23, which require a contract of marine insurance to be expressed in a policy specifying the names of the underwriters. On a case stated by an arbitrator :—

Held, that the contract, by reason of its provisions and the above enactments, was not an agency contract under which the appellants were liable as principals to indemnify the respondents for expenditure incurred by the latter as their agents, but that it was a reinsurance contract, and that the appellants, in the absence of a policy specifying their names as underwriters in accordance with the enactments, were not liable thereunder for the sum claimed.

English Insurance Co. v. *National Benefit Assurance Co.* [1929] A. C. 114 applied.

SPECIAL CASE stated by an arbitrator.

The Mannheimer Versicherungs Gesellschaft (hereinafter called " the appellants ") were a German insurance company carrying on at Mannheim in Germany an insurance business which included the writing of marine insurance risks both original and by way of reinsurance. The Motor Union Insurance Company, Ld. (hereinafter called " the respondents "), were an English insurance company carrying on in England an insurance business similar to that of the appellants.

Towards the end of 1924 the appellants informed the respondents that they were desirous of doing marine insurance business on the English market, and suggested that the respondents should act on that market as agents of the appellants and accept business on their behalf. The proposal was that the respondents should accept risks on that market as agents for the appellants, the respondents themselves issuing the policies in their own name, but pro tanto as agents for the appellants as undisclosed principals. An arrangement on these lines was arrived at by the parties and was embodied in the agreements next hereinafter mentioned.

By an agreement dated and made on April 7, 1925, between the appellants, who were therein throughout described as the principals, and the respondents, who were therein throughout described as the agents, which recited that the appellants were desirous of appointing an agent in the United Kingdom to accept marine and other risks on their behalf but in the name of the agent, and that the respondents had agreed with the appellants to underwrite for the appellants through the London underwriter of the respondents for the time being marine and other insurance risks subject to the terms and conditions thereinafter mentioned. It was thereby agreed between the parties: (clause 1) that on and after April 1, 1925, all risks subject as aforesaid accepted in London by the underwriter for the time being of the marine department of the respondents for which policies were issued in London should be treated as having been accepted on behalf of the appellants to the extent and subject to the limits and provisions contained therein; (clause 3) that the respondents should retain for themselves not less than the same amount in respect of each risk accepted by them and on the same terms as their retention for the appellants, but if for any reason the respondents decided to reinsure partly or wholly the amount retained by them against certain specific risks, they should be entitled to do so subject to the reinsurance by them at the same time and on the same terms of a similar amount underwritten by them for the account of the appellants;

(clause 4) that all proper accounts should be kept by each party with reference to the working of the agreement, and in such accounts the appellants should be credited with the original rates of premium received by the respondents and should be debited with the actual deductions which might from time to time be chargeable as against these original rates and also with their proportion of any bad debts and legal charges whether incurred by the respondents in contesting claims or otherwise in connection with insurances in which they might be interested, and the respondents should be credited with any claims and/or reinsurance and/or return premiums and/or profit commission appertaining to the appellants' share of the underwriting including all compromised claims and ex gratia payments which the respondents in their sole discretion might agree to make, and further as there provided; (clause 13) that the agreement should remain in force until December 31, 1926, and if not then terminated by three months' written notice given by either party should continue from year to year until the expiration of three months' written notice given by either of the parties to the other of their intention to terminate the same; and (clause 14) that in the event of any dispute arising between the parties as to the meaning of the agreement or the fulfilment thereof or any matter or thing arising thereunder or in connection therewith the same should be referred to a sole arbitrator in London to be appointed as therein provided.

To that agreement three supplementary agreements were made by the parties dated respectively December 1, 1926, August 19, 1927, and August 20, 1928, by clause 1 of the last mentioned of which agreements it was provided that subject to the maximum limits fixed by the first agreement the respondents should cede and the appellants should accept in respect of all risks closed or declared to the respondents on or after July 1, 1928, 75 per cent. of the gross line of the respondents.

On September 5, 1929, the respondents gave to the appellants formal notice to terminate the agreements on December 31, 1929.

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Disputes arose between the parties under the agreements, and pursuant to clause 14 of the first agreement an arbitrator was appointed to decide these disputes.

The claim made by the respondents in the arbitration was to recover certain amounts alleged to be due from the appellants under the agreements representing the difference between premiums received and losses paid over a period beginning with the second quarter of 1930 and ending on December 31, 1931. It was agreed by the parties that the total sum for which the appellants were liable, if liability existed in law, was 47,292*l.* 3*s.* 8*d.*

In May and June, 1931, pleadings were delivered in the arbitration, and various defences to the claim were set up by the appellants, all of which were withdrawn before the hearing save one—namely, that the appellants "will object that the said agreement and supplementary agreements are not enforceable in law and will rely upon the Stamp Act, 1891." (1)

The validity or otherwise of that plea was the main issue between the parties. The only other issue arose upon an alternative claim by the respondents to recover as upon an account stated a portion of their total claim—namely, 969*l.* 14*s.* 3*d.*

The arbitrator took upon himself the burden and full hearing of the reference, and on March 4, 1932, gave his award, which at the request of the parties he made in the form of a special case under s. 7 of the Arbitration Act, 1889.

The arbitrator stated in the Case that he found (inter alia) that the arrangement embodied in the agreement was genuinely intended by the parties to be, as on the face of the agreement it purported to be, an agency agreement whereby the respondents were to accept risks for and on behalf of the appellants as principals, and was not merely a colourable arrangement whereby under the guise of agency the parties might carry on a reinsurance business immune from the difficulties created in such cases by the provisions of the Stamp Act, 1891; that policies were issued to the assured in every case by the respondents for the full amount underwritten in the name of the respondents, or of the respondents and another insurance company called the United British Company in specified proportions; that the proportion specified as being that of the respondents was treated by them as appertaining to the extent of 50 per cent. to the appellants, but in the policies issued the name of the appellants was not disclosed to the assured, and that as between the parties no policies were ever issued.

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(1) The Stamp Act, 1891, provides:

Sect. 93: "(1.) A contract for sea insurance . . . . shall not be valid unless the same is expressed in a policy of sea insurance.

"(3.) A policy of sea insurance shall not be valid unless it specifies . . . . the names of the subscribers or underwriters. . . . ."

The Marine Insurance Act, 1906, provides:

Sect. 22: "Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. . . . ."

Sect. 23: "A marine policy must specify—. . . . (5.) The name or names of the insurers."

In the final paragraphs of the Case the arbitrator in setting forth the conclusions at which he arrived stated: (para. 16) that as regarded a portion of their total claim—namely, 969*l.* 14*s.* 3*d.*, the respondents contended, in the alternative, that they were entitled to recover that as on an account stated; (para. 17) that in answer to that claim the appellants contended (*a*) that the letters did not show an account stated, and (*b*) that even if they did, the item or items in question were not a proper basis for an account stated in view of their contention that the main agreements were void under the Stamp Act; and that subject to the opinion of the Court he (the arbitrator) held that both these contentions were sound and that the respondents were not entitled to recover as on an account stated; (para. 18) that as to the main agreements the appellants contended that notwithstanding that the parties might have intended the business done to be that of principal and agent, nevertheless it was in essence the business of a reinsurance treaty, and there being no policy or policies issued between the respondents and appellants the agreements were null and void under the Stamp Act, 1891; that they further contended that the agreements even if in truth and in fact agency agreements were a contract or contracts relative to sea insurance within the meaning of the Stamp Act, 1891, and not being embodied in the form of a policy were null and void; and that subject to the opinion of the Court he (the arbitrator) held that these contentions failed and that the agreements and each of them were valid and enforceable; (para. 19) that subject to the opinion of the Court, he (the arbitrator) awarded that the respondents were entitled to recover from the appellants the sum of 47,292*l.* 3*s.* 8*d.* and that the appellants should pay to the respondents that sum together with a further sum in respect of interest which he assessed at 2000*l.*, and that the appellants should pay to the respondents their costs of the reference and of the Award; (para. 20) that the question for the opinion of the Court was whether on the facts found and on the documents the Award was correct in law; (para. 21) that if the Court should be of opinion that the Award was correct in law it should stand; (para. 22) that if the Court should be of opinion that the Award was incorrect in law but that the respondents were entitled to recover on an account stated as set out in para. 16 then the Award should be set aside and in lieu thereof he (the arbitrator) awarded that the appellants should pay to the respondents the sum of 969*l.* 14*s.* 3*d.* without interest and further should pay to the respondents one-half of their costs of the reference and should bear and pay the costs of the Award; and (para. 23) that if the Court should be of opinion that the Award in para. 19 thereof was incorrect in law and further that the respondents were not entitled to recover on an account stated, then he awarded that the appellants were under no liability to the respondents and that the respondents should pay to the appellants their costs of the reference and of the Award.

A. T. Miller K.C. and *H. Atkins* for the respondents, the Mannheimer Company.

Stuart Bevan K.C. and *Sir Robert Aske* for the claimants, the Motor Union Company.

1932. June 10. Goddard J. This is a special case stated in an arbitration between two insurance companies, both interested in the writing of marine risks. The dispute arises out of an agreement dated April 7, 1925, varied by subsequent agreements, under which the Motor Union Co. were to accept risks on the English market as agents for the Mannheimer Co. The scheme was that the Motor Union Co. were to issue policies in their own name but pro tanto as agents for the Mannheimer Co. as undisclosed principals, retaining for themselves not less than the same amount and on the same terms as their retention for the Mannheimer Co., the amount being subsequently varied to the proportion of 75 per cent. for the Mannheimer Co. and 25 per cent. for the Motor Union Co. In the events which happened the business resulted in a considerable loss, and the Motor Union Co. sought to recover in the arbitration an amount representing the difference between premiums received and losses paid over a period of some eighteen months. The agreement itself did not provide expressly for the payment of such a loss, and the Motor Union Co. based their claim on the term implied by law whereby an agent is entitled to be reimbursed by his principal any loss or expense incurred by him on his principal's behalf. The only defence insisted upon before the learned arbitrator was that the agreement, by which I mean both the original and subsequent agreements read together, was unenforceable by reason of the Stamp Act, 1891, no policies having been issued between the parties. The learned arbitrator rejected this contention and, subject to the opinion of the Court, awarded in favour of the Motor Union Co.

The arbitrator has found that the agreement was genuinely intended by both parties to be what it purported to be, that is an agency agreement, whereby the Motor Union Co. accepted risks as agents for the Mannheimer Co., and was not a reinsurance agreement under the guise of agency. But it is contended by Mr. Miller on behalf of the Mannheimer Co. that assuming the good faith and genuine intentions of the parties and even assuming that the parties might have worked the business differently under the agreement, the way in which it was in fact conducted resulted in reinsurance and nothing else; and that the claim for indemnity arose because the Motor Union Co. had paid a marine loss, and that if they sought to be repaid that was a reinsurance. He further contended that any agreement to reimburse, whether express or implied, was a contract relating to sea insurance, so that in either view the claim failed for want of a policy. Mr. Miller disclaimed the necessity of saying that the agreement itself must be unenforceable, because he said the parties might have worked it differently —namely, by the Motor Union Co. issuing policies in the name of the Mannheimer Co. But to do so would, I think, both on the findings of fact by the arbitrator and on the true construction of the agreement, have been contrary to the true intention of the parties and to the express term of the agreement itself. The first recital and clause 3 seem to me to make it clear that policies were to be issued always in the name of the Motor Union Co., the Mannheimer Co. remaining an undisclosed principal. The question is what is the effect in law of such an agreement; can the agent enforce the implied contract of indemnity in such circumstances?

It is a commonplace of the law of agency that an undisclosed principal may sue or be sued upon a contract made on his behalf, but in the case of sea insurance the Marine Insurance Act, 1906, s. 22, provides that a contract of marine insurance is inadmissible in evidence unless embodied in a marine policy in accordance with the Act, and by s. 23 the policy must specify, among other things, the name or names of the underwriters. By s. 93 of the Stamp Act, 1891, a contract of sea insurance, which includes reinsurance, is void unless expressed in a policy, and a policy is void which does not specify the names of the underwriters. Clearly, therefore, as the name of the Mannheimer Co. did not appear in the policies issued in pursuance of the agreement they could not have intervened as principals so as to sue the assured for a premium, nor could they have been

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MOTOR UNION INSURANCE CO. v. MANNHEIMER VERSICHERUNGS GESELLSCHAFT.

Goddard J.

sued for a loss. In either case the absence of a policy subscribed in their name would have been fatal. The statutes prevent any privity of contract being established between the Mannheimer Co. and the assured by the action or agency of the Motor Union Co., and the latter and they only, in my judgment, are the insurers. Any premiums received were received by them, and any losses paid were paid by them as principals, in respect of a liability which was theirs and only theirs. If that be so, it seems to me that any claim they may have against the Mannheimer Co. is not for indemnity against loss sustained as agents but is in the nature of a reinsurance, and I am fortified in this opinion by the case of *English Insurance Co.* v. *National Benefit Assurance Co.* (1) True it is that the agreement in that case did not purport to be one of agency, and was described as a participation agreement; but, while its terms differ in expression from those under consideration, the general effect seems to be the same. In that case the English Insurance Co. were to write the risks in their name and to settle claims, the National Co. sharing in the premiums and losses. The parties were called participators, but in effect the one company was acting as agent for the other. It seems to me to matter little if at all whether the parties are called participators partners or principal and agent; what does matter is what is effected by the agreement. In that case it was held that it was reinsurance, and both Lord Hailsham L.C. and Lord Atkin stress the point that, as in the present case, there was no privity created between the National Co. and the assured. I refer particularly to that part of Lord Atkin's judgment where he says: "The test of whether it is a reinsurance or not has been in my view quite correctly stated to be the question whether or not the reinsurers or the alleged reinsurers have assumed a contractual liability to the original assured, for such an original contractual liability is not an incident of reinsurance, and if such an original liability had been assumed then there would have been a contract of insurance upon which a stamp had already been paid on the policy issued by the English Company, who it is said for this purpose were the partners, or the agents, apart from a partnership, of the National Company." (1) I do not think that the case cited is distinguishable in principle from the present, and accordingly I must hold that the claim here is in effect a claim for reinsurance, and so must fail for want of a policy. Accepting to the full the finding of the arbitrator as to the good faith and intentions of the parties the statutes do not in my judgment permit of the agreement being enforced.

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(1) [1929] A. C. 114.

A minor question is raised in the Case as to whether the claimants can succeed on an account stated as to part of their claim. Mr. Bevan admitted that this point was covered by the judgment of Maugham J. in *In re Home & Colonial Insurance Co.* (2), and consequently while desiring that the point should be left open to him in another Court he did not ask me to differ from that decision. The result is that I answer the question propounded in para. 20 of the Case in favour of the respondents and confirm the award in favour of the respondents set out in para. 23 of the Case.

With regard to costs, in *Genforsikrings Aktieselskabet* v. *Da Costa* (3) a defendant who succeeded on a plea of the Stamp Act was deprived of his costs by Hamilton J., as he then was, and one naturally gives effect with some reluctance to a defence set up not from a desire to protect the revenues of the country but merely to escape a liability which in honour the respondents ought to pay. But I have nothing to do with the costs of the arbitration, and as the learned arbitrator has awarded them to the respondents in the event of the Case being resolved in their favour I do not think I ought to deprive them of the costs of this argument, and the order will accordingly be with costs.

Solicitors for respondents, the Mannheimer Co.: *Constant & Constant.*

Solicitors for claimants, the Motor Union Co.: *Ince, Roscoe, Wilson & Glover.*

(1) [1929] A. C. 124.
(2) [1930] 1 Ch. 102, 127.
(3) (1910) 16 Com. Cas. 1.

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Co., Ltd. [1948] 2 All E.R. 35.

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HASELDINE *v.* HOSKEN.

[1932. H. 3469.]

Insurance—Solicitor's Indemnity Policy—Insurance against Loss arising from Neglect, Omission or Error when acting as Solicitor—Loss by Reason of making Champertous Agreement—Public Policy.

A solicitor took out an indemnity policy, which insured him against loss arising by reason of any neglect, omission or error while acting in his professional capacity. During the currency of the policy he sustained loss through having, without realizing the fact, entered into a champertous agreement. On a claim to be indemnified :—

Held, that the agreement being champertous, and therefore illegal and contrary to public policy, a claim in respect of loss due to having contracted it was not maintainable.

Held, further, that the loss in respect of which indemnity was claimed did not arise by reason of any neglect, omission or error committed by the solicitor in his professional capacity, but arose from his entering into a personal speculation.

Observations of Kennedy J. in *Burrows* v. *Rhodes* [1899] 1 Q. B. 816, 828 approved and adopted.

Tinline v. *White Cross Insurance Association* [1921] 3 K. B. 327 and *James* v. *British General Insurance Co.* [1927] 2 K. B. 311 distinguished, and opinion reserved (per Scrutton and Greer L.JJ.) as to their correctness.

Decision of Swift J. reversed.

Appeal from a decision of Swift J.

The plaintiff, who was a solicitor practising under a firm name, sued the defendant, an underwriting member of Lloyd's, claiming : (1.) a declaration that the defendant in proportion to the sum insured by him under a Solicitor's Indemnity Policy, dated January 26, 1932, was liable to indemnify the plaintiff in respect of a loss sustained by him, and (2.) an order for payment of the amount due from the defendant to the plaintiff under the policy in respect of the said loss.

The policy under which the plaintiff claimed recited that in consideration of the payment of the premium the underwriters agreed to insure the plaintiff's firm " from loss arising from any claim or claims which may be made against them during the twelve calendar months commencing on January 16, 1932, and ending on January 15, 1933, ... by reason of any neglect, omission or error whenever or wherever the same was or may have been committed or alleged to have been committed on the part of the firm or their predecessors in business or any person now or theretofore employed by the firm or their predecessors in business or hereafter to be employed by the firm during the subsistence of this policy in or about the conduct of any business conducted by or on behalf of the firm or their predecessors in business in their professional capacity as solicitors." The policy provided for notice being given to the underwriters of any claim made against the assured by a third party; and it provided that "this policy does not extend to insure the firm in respect of any claim made against them for libel or slander."

The circumstances giving rise to the action were as follows: a Mr. Broad, then in Japan, who had been the agent in that country of the English company of Sterns, Ld., was in 1928 making a claim against that company in respect of commission, and to enable that claim to be prosecuted he gave a power of attorney to a Mr. Aveyard authorizing him to take steps to recover the amount claimed. Broad, however, stipulated that Aveyard was to be liable for any costs required in connection with the action, but on the other hand was to receive one-half of the amount that might be recovered from Sterns. Aveyard then instructed the present plaintiff to act as solicitor in the action against Sterns, and by a letter written to Aveyard dated November 27, 1928, in reference to that action, the present plaintiff agreed to pay all disbursements in connection with the action against Sterns, including Court fees, counsel's fees, etc., and the amount to be paid into Court as security, but not including the costs and expenses of any essential witnesses being brought to this country or of their evidence being taken on commission in Japan, and further, to make no charge against Broad or Aveyard in respect of professional charges in the event of the action not being successful. The letter further went on to say that it was understood and agreed that, apart from the costs the present plaintiff might recover from Sterns in the event of the action being successful or being settled, he should be paid out of the damages or other moneys awarded on the trial of the action or paid under any settlement or agreement of compromise 20 per cent. of the amount so awarded against, or agreed to be paid by, Sterns, and in any event the minimum amount of the percentage to be paid to the present plaintiff was to be 200*l.* No settlement or compromise of the action was to be effected without the concurrence of Aveyard and the present plaintiff.

In February, 1930, Broad came to England, and in a letter dated February 28 of that year addressed by him to the present plaintiff a new arrangement with regard to the prosecution of the action against Sterns was set out and in terms agreed to by the present plaintiff. Those terms were that in consideration of the present plaintiff paying the disbursements in connection with the action against Sterns, and having found the security ordered for costs, and agreeing to make no charge for professional charges against Broad in the event of the action not being successful, the present plaintiff, in addition to receiving such costs as he might recover from Sterns if the action against them were successful, was to be entitled to 40 per cent. of the damages recovered from Sterns or paid by them under terms of settlement, and in any event the minimum amount of the percentage to be paid to the present plaintiff was to be 500*l.* No settlement or compromise of that action was to be effected without the consent of the present plaintiff and Broad.

The action by Broad against Sterns came on for trial before McKinnon J., when judgment was entered for Sterns with costs, and on appeal that judgment was affirmed.

Sterns being unable to recover their taxed costs in the action from Broad, and having become aware of the letters passing between the present plaintiff and Aveyard and Broad above referred to, commenced an action against the present plaintiff claiming damages for champerty and/or maintenance. That action was settled by the present plaintiff paying Sterns a sum of 950*l.* Having paid that sum, the present plaintiff now claimed to be indemnified under the policy underwritten by the defendant among others.

SWIFT J., after stating the terms of the policy sued on, continued: A solicitor's business is a very onerous one, imposing upon those who take charge of it great responsibilities, and requiring them to attain to high professional standards. Solicitors, being human, are liable to make slips, and not unnaturally they desire to insure themselves against the consequences of those mistakes. Among other matters with which they have to deal is the drawing of contracts, and, like other people, they are liable to give bad advice or to advise their clients to enter into contracts which may be bad or illegal. They will not do this, of course, provided they are honest men, as I believe Mr. Haseldine to be, except through error or mistake. Sometimes, too, they are liable to make mistakes not only in advising their clients but in the conduct of their own affairs. An arrangement between a solicitor and a client as to the costs of an action is part of a solicitor's business. Sir George Jessel in *In re Attorneys and Solicitors Act*, 1870 (1), said that under s. 4 of the Solicitors Act, 1870, a solicitor may make what bargain he likes with his client. Sect. 11 of the same Act puts restrictions and qualifications upon this, but in my opinion it is clearly a part of the business of a solicitor in his professional capacity to arrange with his client as to payment.

In this case Mr. Haseldine made a bargain with his client which was unfortunately illegal. I am quite satisfied that in making that bargain Mr. Haseldine acted innocently—ignorantly, no doubt, because he ought to have known what I suppose many people do not know, and what I am certain everybody did not know, that s. 11 of the Attorneys' and Solicitors' Act, 1870, forbids the making of such a bargain. Mr. Haseldine ought to have known this, but I believe that he made the bargain honestly and in ignorance of the fact that the section forbids it. That, it seems to me, was one of the very things which he had insured himself against—the doing of something inadvertently, by error, by negligence, something which he ought not to have done; and what he desired to do was to insure himself against any loss which might result from

(1) (1875) 1 Ch. D. 573.

such an act on his part, which he could not foresee, and which, when he took out the policy, he did not know was going to happen any more than a man who takes out a fire policy in respect of his house foresees that his youngest daughter is going to drop a lighted cigarette on the drawing room carpet; yet, when that event happens, he is entitled to claim under his policy. A man, when he takes out a policy, does not foresee stupidities which he may commit, or which some one else is going to commit, to the damage of his property. He takes it out in as wide terms as he can to protect himself against any mishap which may happen to him; so here, Mr. Haseldine took out this policy for the purpose of protecting himself against such an error of judgment as should result through his entering, in his professional capacity, into a contract with a client which turned out to be illegal, and which, as a consequence of being illegal, gave rights to third parties. The persons against whom Mr. Haseldine's client was bringing the action, hearing of that agreement, brought an action against Mr. Haseldine claiming damages, and he paid a sum of 950*l.* to settle it. He now says: "That is a loss which arose through neglect, omission or error in the way I advised my client in my business in my professional capacity as a solicitor. If I had been a wise man I should have said to my client: 'You must pay me down or go out of my office; I will not do any work unless I am paid; you must give me the money that has to be paid into Court as security before I will pay a penny into Court'"; or he might have said: "I cannot agree to divide with you the proceeds of the action, but you can give me a charge on whatever is recovered for the whole amount which may be found to be due to me on taxation." As it was he made an error of judgment. He omitted to consider what his real position was; he neglected to take advice about the matter; and he made this agreement; he made it honestly; it occasioned him the loss which he has sustained, and I think he is entitled to recover that loss from the underwriters.

Mr. Eastham, who is always helpful to the Court, has supplied me with a note of his arguments. These do credit to his ingenuity and research, but I cannot think that a solicitor who is endeavouring to protect himself from slips owing to negligence or errors of judgment and omission in conduct has not covered himself by such a policy as this from the loss which has resulted from his inadvertently entering into an agreement which, without his knowledge and certainly without his approval, subsequently turns out to be illegal. There will be judgment for the amount claimed and costs.

The defendant appealed.

Eastham K.C. and *Bowstead* for the appellant. Swift J. was wrong in holding that the claim in this action is maintainable. A claim arising out of a champertous agreement does not arise " by reason of any neglect, omission or error " within the terms of the policy sued on. The making of a champertous agreement is a misdemeanour, and is forbidden by s. 11 of the Attorneys' and Solicitors' Act, 1870. In *James* v. *British General Insurance Co.* (1) Roche J. adopted the principle enunciated by Kennedy J. in *Burrows* v. *Rhodes* (2), where he said that " if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void." Champerty is " manifestly unlawful," and that fact distinguishes the present case from the decisions in *Tinline* v. *White Cross Insurance Association* (3), and *James* v. *British General Insurance Co.* (1), in each of which it was held that a motorist who had effected a policy covering liability for accidental bodily injury to any person caused by negligence was held covered, even though the negligence was gross and attended by criminal consequences. In those cases that which was done by the motorist was not " manifestly unlawful " or a crime in itself. Further, the present plaintiff was not acting in his professional capacity as a solicitor; he was conducting the

(1) [1927] 2 K. B. 311. (2) [1899] 1 Q. B. 816, 828.
(3) [1921] 3 K. B. 327.

case against Sterns on his own behalf and for his own benefit, in the nature of an illegal speculation. Even assuming that he acted in good faith, his ignorance of the law cannot avail him; it would be no excuse if he had been indicted for the misdemeanour of champerty.

Porter K.C. and *J. P. Eddy* for the respondent. The loss in respect of which the claim for indemnity is made arose by reason of "neglect, omission or error" on the part of the assured, the "neglect" or "omission" being the entering into the agreements in the honest belief by the assured that he was acting lawfully, and the "error" being his failure to take advice as to the propriety of the agreements, which were made "in or about the conduct" of the business conducted by him in his professional capacity as a solicitor. It is by no means clear that the agreements were champertous. A champertous agreement like one for maintenance involves, according to the opinion of Lord Shaw and Lord Phillimore in *Neville* v. *London Express Newspaper* (1), the doing of something to stir up strife or to bolster up an improper or improbable claim. That characteristic is entirely absent in the present case. The assured did not know that the agreements might be considered illegal, and not knowing that and not intending that they should be, he is entitled to recover just as the assured in *Tinline* v. *White Cross Insurance Association* (2) and *James* v. *British General Insurance Co.* (3) were held entitled to recover, though they had been guilty of criminal acts. Those decisions establish this, that if a person insures against things which may be said to be indifferent, but one of which in the event may turn out to be criminal, the assured is entitled to recover in respect of loss occasioned by his act which in fact is criminal, but which he did not deliberately intend to commit.

[GREER L.J. Your client intended to make the agreements in question.]

He intended the act, not the consequences. By the policy he wanted to be protected against errors in law, and his entering into the agreements was an error. Moreover, it is to be noted that s. 4 of the Attorneys' and Solicitors' Act, 1870, enables a solicitor to make an agreement with his client respecting the payment of his costs, "either by a gross sum, or by commission or per-centage." That gives a solicitor power to contract in the widest terms. Sect. 11 of the Act merely qualifies the right given by s. 4. Further, it is to be noted, that if claims in respect of libel and slander were not specifically excluded by the terms of the policy, such claims would give rise to an indemnity notwithstanding that libel may in certain circumstances be an offence.

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(1) [1919] A. C. 368.
(2) [1921] 3 K. B. 327.
(3) [1927] 2 K. B. 311.

[*Smith (W. H.) & Son* v. *Clinton* (1); *Oram* v. *Hutt* (2); and *In re a Solicitor* (3) were also referred to.]

SCRUTTON L.J. The plaintiff, a solicitor, brought an action against the defendant, a Lloyd's underwriter, on a policy, called a Solicitor's Indemnity Policy, which insured him against loss arising from claims made against him "by reason of any neglect, omission or error . . . . committed or alleged to have been committed on the part of [his] firm or their predecessors in business or any person now or heretofore employed by the firm or their predecessors in business . . . . during the subsistence of this policy in or about the conduct of any business conducted by or on behalf of the firm . . . . in their professional capacity as solicitors." Swift J. gave judgment in favour of the plaintiff, and the defendant appeals; and, apart from the personal interests of the parties, the case raises questions of public importance. I regret that I am unable to concur with the view taken by Swift J.

The facts giving rise to the claim are these: a Mr. Broad had been for some years acting in Japan as the agent of Sterns, Ld., in England, and he alleged that Sterns were owing him more commission than they had paid him. Being unable to obtain a settlement of his claim, he sent to this country one Aveyard, with a power of attorney, to try to get payment for him from Sterns. Aveyard was to pay all the

(1) (1908) 99 L. T. 840.
(2) [1914] 1 Ch. 98.
(3) [1912] 1 K. B. 302.

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costs, but in return he was to receive half the amount that might be recovered from Sterns. Aveyard got into touch with Mr. Haseldine, who then issued a writ on behalf of Broad against Sterns. As Broad was in Japan an order was made that he should give security for costs to the amount of 30*l.* Aveyard seems to have told the plaintiff that he had not that sum, and as Broad had sent no money the question arose between Aveyard and Mr. Haseldine how the action was to be carried on. On November 27, 1928, an agreement was made between them, that is the first agreement complained of in the subsequent proceedings. Of its terms there can be no misunderstanding. By that agreement Mr. Haseldine was not to make any claim on Broad or Aveyard in respect of his professional charges in the event of the action not being successful, and that, apart from the costs that might be recovered if the action were successful, Mr. Haseldine was to be paid out of the damages 20 per cent., and in any event the minimum of the percentage to be paid was to be not less than 200*l.* It then continued: "No settlement or compromise of the said action shall be effected without the concurrence of yourself and ourselves." Mr. Haseldine, in effect, says, "I will carry on this action without charge to you on the terms that I shall get a percentage of the amount recovered, and the action must not be settled without my consent." At a later stage, in February, 1930, Broad came to England, and then Mr. Haseldine concluded the agreement of February 28, 1930. It is a curious fact, about which Mr. Haseldine was not asked at the trial, that not long before that agreement was made he took out the indemnity policy upon which this action was brought. The second agreement is as plain as the first: Mr. Haseldine agrees to make no charge against Broad for carrying on the action, and Broad is to pay the plaintiff out of the damages recovered from Sterns 40 per cent. of the amount, and no settlement or compromise is to be effected without the concurrence of Mr. Haseldine and Broad. The action by Broad against Sterns came on before MacKinnon J. and failed; an appeal against that decision was dismissed; and the costs incurred

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by Sterns in defending the action amounted to something like 1700*l.* Broad had only 500*l.*, and for the rest Sterns were left without any recourse unless they could recover anything from Mr. Haseldine. The consequence therefore of that action being carried on by Mr. Haseldine without being on the record and so being liable for the costs was that the action had been maintained and carried on at a cost to the successful party of 1700*l.*, of which only 500*l.* could be recovered from Broad.

Sterns found out about these agreements and it occurred to them, as it would to any one, that they were illegal. For a long time champerty has been an offence known to the law. For centuries it has been an offence for a person to maintain another in prosecuting an action on the terms that he shall have a share of the proceeds that may be recovered. Mr. Porter startled me by appearing to argue that the agreements in question did not disclose the offence of champerty. I should have thought they did under any definition of the offence. In the statute 33 Edw. I., stat. 2, I find this passage, which oddly enough was not cited in *Neville* v. *London Express Newspaper* (1): "Champertors be they that move pleas and suits, or cause to be moved either by their own procurement, or by others, and sue them at their proper costs for to have part of the land in variance, or part of the gains." A man who has nothing to do with the merits of an action promotes it or carries it on so that he may get part of the gains of the plaintiff. In *Neville's* case (1) I find Lord Finlay L.C. said this (2): "Champerty is a form of maintenance, and occurs when the person maintaining another takes as his reward a portion of the property in dispute." There is a legal work which solicitors are supposed to know—Cordery on Solicitors, and in that book I find on p. 273 this statement: "Champerty (campi partitio) is 'when he who has maintained another is to have by agreement part of the land or debt in the suit.' Thus, in contentious business, an agreement to remunerate a solicitor by a share of, or commission on, or sum proportioned to the

(1) [1919] A. C. 368.

(2) Ibid. 382.

amount of, the property to be recovered, is bad, and the Sol. Act, 1870, ss. 4, 11, has not altered the law." I turn to s. 11 of that Act, which provides that "Nothing in this Act contained shall be construed to give validity to any purchase by an attorney or solicitor of the interest, or any part of the interest, of his client in any suit, action or other contentious proceeding to be brought or maintained, or to give validity to any agreement by which an attorney or solicitor retained or employed to prosecute any suit or action, stipulates for payment only in the event of success in such suit, action, or proceeding." I am therefore quite clear that the agreements were champertous.

Swift J. heard Mr. Haseldine in the box and believed him when he said that he knew nothing about champerty, knew nothing about it under the Solicitors Act, and that he had no idea that it was a criminal offence to prosecute an action at his expense on the terms that he should receive a share of the amount that might be recovered. I hope that no other solicitor is in such a state of blissful ignorance on this subject.

The next thing that happened was that Sterns commenced an action against Mr. Haseldine, alleging that in making the agreements he had committed an offence by reason of which they, Sterns, had suffered loss through being unable to recover against Mr. Haseldine's client. Mr. Haseldine settled that action by paying a sum of 950*l.*, and in view of that it hardly lies in his mouth to argue that the agreements were not champertous. Having paid that sum to Sterns, Mr. Haseldine claimed to be indemnified under the policy which indemnified him against loss owing to his neglect, omission or error. It is puzzling to know what the neglect, omission or error was. Mr. Haseldine knew what he was doing in this sense that he made the agreements which clearly expressed what he intended. It is quite true that he appears to have been unaware that what he was doing was illegal or that he was committing a criminal offence; that, however, is not the kind of neglect, omission or error contemplated by the policy. I approach the consideration of the policy in two ways: if making a champertous agreement is neglect omission or error, it is contrary to public policy to insure against it. It is clearly contrary to public policy to insure against the commission of an act, knowing what act is being committed, which is a crime, although the person committing it may not at the time know it to be so. The other view is, and I think this is the more likely view, that the commission of a criminal act, knowing what the act is that is being committed, does not come within the words, "neglect, omission or error."

Some little difficulty is created by two decisions, one by Bailhache J. in *Tinline* v. *White Cross Insurance Association* (1), and the other by Roche J. in *James* v. *British General Insurance Co.* (2) in connection with the insurance of motorists, following upon a passage in the judgment of Kennedy J. in *Burrows* v. *Rhodes* (3), which was not concerned with this class of case. That case arose in this way: Burrows had been induced by misstatements to enter into the unfortunate Jameson expedition, and he claimed in his action to be indemnified by the person who made the misstatements against the unpleasant consequences that happened. Kennedy J. stated the law in this way (4): "It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom." It is to be noticed that Kennedy J. uses two phrases, "if an act is manifestly unlawful," "or the doer of it knows it to be unlawful." Those two phrases must mean two different things, for if the first means that the act is manifestly to the man who does it unlawful, there was no need to use the second phrase. In using the expression, "if an act is manifestly unlawful," I think Kennedy J. meant such an act about which there could be no doubt that it is unlawful. I say that because in *James* v. *British General Insurance Co.* (5) Roche J. altered

(1) [1921] 3 K. B. 327.
(2) [1927] 2 K. B. 311.
(3) [1899] 1 Q. B. 816.
(4) Ibid. 828.
(5) [1927] 2 K. B. 311, 323.

the phrase and said that "although the plaintiff might have done . . . . that which was unlawful, yet he did not do it in circumstances which made it to him manifestly unlawful." That I think is a wrong reading of Kennedy J.'s language. Kennedy J. went on in two passages in *Burrows* v. *Rhodes* (1) to use language which has considerable relevance to the present case. He said (2): "Where the circumstances constituting the unlawfulness of the act are known to the doer of it, his inability to claim contribution or indemnity appears to me to be clear." In the present case the circumstances constituting the unlawfulness were well known to Mr. Haseldine. He knew he was making a contract to provide the costs to carry on an action without being able to claim them from his client on the terms that he should get a percentage of the amount recovered and should have power to prevent a settlement of the action. The other passage in the judgment of Kennedy J. is this (3): "Nor, in my judgment, can there be any valid claim to indemnity where the doer of the act which constitutes the offence has done it with knowledge of all the circumstances necessary to constitute the act an offence"—Mr. Haseldine had that knowledge—"but in ignorance that the act done under those circumstances constituted an offence. A man is presumed to know the law." The first passage in Kennedy J.'s judgment has formed the justification for the decision of Bailhache J. in *Tinline* v. *White Cross Insurance Association* (4) and of Roche J. in *James* v. *British General Insurance Co.* (5) that a motorist insured under a motor policy may recover where damage has been caused to a third party through negligent driving in circumstances which involve the commission of a crime. The distinction which leaps to the eye between those cases and the present may be found in that passage of the judgment of Bailhache J. in *Tinline's* case (4) where he says (6): "It must of course be clearly understood that if this occurrence had been due to an

(1) [1899] 1 Q. B. 816.
(2) Ibid. 828.
(3) Ibid. 829.
(4) [1921] 3 K. B. 327.
(5) [1927] 2 K. B. 311.
(6) [1921] 3 K. B. 332.

intentional act on the part of the plaintiff, the policy would not protect him." In my view these are the exact circumstances of the present case, for Mr. Haseldine intended to make the agreement; he wrote it out himself; he knew what he was doing in the sense that it was an intentional act on his part, an act different from those in the motor insurance cases where the motorist was negligent and his negligence was followed by consequences which he did not expect. Roche J. says the same thing in *James* v. *British General Insurance Co.* (1): "it was negligence, and was not the wilful or advertent doing of the act." With regard to these two decisions, they do not in my view affect this case, and I do not think it necessary, nor do I intend, to express any opinion on the question whether I should follow them if the point involved came before me and it became necessary to consider them. The present position of the law of motor insurance, in view of the statutory requirements of compulsory insurance, is in such a complicated state that we should not pronounce any opinion upon it until we are obliged to do so; but I desire to add this, that it must not be taken, because I say nothing more in this case about the two decisions just mentioned or whether I agree or do not agree with the principle on which they are based, that I at present approve of them. As I have said, the facts of this case bring it within the principle which Kennedy J. and, later, both Bailhache J. and Roche J. accepted—namely, where a man intentionally does an act which, though he does not know it, is in fact criminal.

Swift J. in his judgment has taken the view that Mr. Haseldine had "made an error of judgment. He omitted to consider what his real position was, neglected to take any advice about the matter; he made this agreement; I think he made the agreement honestly; it occasioned him the loss he has sustained, and I think he is entitled to recover that loss from the underwriters." Again: "I cannot think that on the whole a solicitor who is endeavouring to protect himself from slips of negligence and errors of judgment

(1) [1927] 2 K. B. 311, 323.

and omission in conduct has not covered himself by such a policy as this from damages which have resulted from his inadvertently entering into an agreement which, without his knowledge, certainly without his approval, subsequently turns out to be illegal." I do not quite understand why the judge says "subsequently turns out to be illegal." It was illegal from the start. It meant that which Mr. Haseldine intended it to mean, and where the difficulty has arisen is that Mr. Haseldine intended it to mean that he had forgotten the elementary rules about champerty and had forgotten the very clear language of the Solicitors Act, 1870, which regulates the profession to which he belongs. The judge has taken very little account of the fact that from the start this agreement was criminal; that is, it subjected the person making it to criminal consequences. I cannot accept the view of Mr. Haseldine that if you do not know the law you are all right. As Kennedy J. said, if a person does not know the law so much the worse for him. The appeal, therefore, must be allowed.

GREER L.J. I agree that this appeal should be allowed, and were it not for the fact that we are differing from a judge of great experience I should not desire to add anything.

I accept, as we must, the learned judge's finding that Mr. Haseldine honestly stated that he did not know that the agreements he made with his client Broad were illegal. He had either never known, or if he had ever known, it had passed from his mind, that it was illegal to make a bargain whereby he was by the earlier of them to receive 20 per cent. for himself of the amount recovered on behalf of his client, and 40 per cent. under the second agreement, and in any event a share of the result of the litigation of not less than 500*l.* I agree with Scrutton L.J. that such agreements ought to be discouraged as being contrary to the law of this country, a policy which has been emphasized over and over again, and indeed so seriously emphasized that agreements of this kind are treated not merely as void and unenforceable, but as criminal acts which may lead to an indictment.

Champerty is described in Stephen's Criminal Law, 6th ed., art. 156, thus: "Champerty is maintenance in which the motive of the maintainor is an agreement that if the proceeding in which the maintenance takes place succeeds, the subject-matter of the suit shall be divided between the plaintiff and the maintainor." That that is a true description of the two agreements made by Mr. Haseldine with his client Broad there can be no question, notwithstanding the endeavour made by Mr. Porter to limit that definition so that it applies only to cases where the person doing the act knows that he is assisting an improper action. I think it clear that these agreements were champertous. It follows that if they were, any contract by policy or otherwise to indemnify the person making them against acts which are of a criminal character and make him liable to indictment are necessarily and entirely void as being contrary to public policy. In this country, whatever may be the case in other countries, no person is allowed to insure himself against the commission of a crime. A person may insure himself against errors of law, but not against the commission of a crime.

With regard to the policy sued on it is important that its construction should be approached from the point of view that it was not intended to indemnify against a criminal act. What it was intended to do was to cover the case of a solicitor who, in conducting the business of his client, either in conveyancing or when representing him in litigation, made a mistake about the facts or a mistake about the law, or did something while acting on behalf of his client which rendered him, the solicitor, liable to a third party. The acts intended to be covered were those he was doing not to secure a benefit for himself, but those he was doing on behalf of his client. Read in that way this policy does not indemnify Mr. Haseldine in respect of the consequences of his making the two agreements by which he was to secure an interest in the result of the litigation—agreements which, in view of the law of this country, he ought not to have made. The damage that arose did not arise owing to any neglect, omission or error of

Mr. Haseldine in his professional capacity as a solicitor, and therefore was not covered by the policy sued on.

I agree with what Scrutton L.J. has said in reference to the two decisions in *Tinline* v. *White Cross Insurance Association* (1) and *James* v. *British General Insurance Co.* (2) I find it a little difficult to distinguish those cases from the present, but I do not wish to say anything to preclude their full consideration in a case which arises on facts similar to those in the two decisions mentioned. I can conceive it as desirable to draw a distinction between the class of case where the act to be indemnified by the policy is one intended by the law that people should insure against, and an act which is not the intentional doing of something against the law, but an act which by accident results in the death of some one, and which would only have been actionable civilly if the accident had not resulted in the death of the unfortunate person injured. There may be good reasons for distinguishing that class of case from the present case, but, however that may be, I have no doubt that this appeal should succeed. I think Swift J. did not pay sufficient attention to the fact that the agreements in question were illegal.

SLESSER L.J. I agree, and will only refer, on the general question of the fact of illegality preventing the successful prosecution of a claim like this, to two passages in the judgment in *Scott* v. *Brown, Doering, McNab & Co.* (3) The first is that of Lindley L.J., who said (4): "If the evidence adduced by the plaintiff proves the illegality the Court ought not to assist him. If authority is wanted for this proposition, it will be found in the well-known judgment of Lord Mansfield in *Holman* v. *Johnson*." (5) The other passage is from the judgment of A. L. Smith L.J., where he said (6): "If a plaintiff cannot maintain his cause of action without shewing, as part of such cause of action, that he has been guilty of illegality, then the Courts will not assist him in his cause of action." But, quite apart from the question of illegality, I have come to the conclusion that in this case Mr. Haseldine fails to show that he comes within the indemnity policy at all. The obligation of the policy to indemnify Mr. Haseldine for loss is limited to cases "in or about the conduct of any business conducted . . . . in [his] professional capacity as a solicitor." In my view, looking at the agreements made by Mr. Haseldine, and quite apart from any question of champerty, they were agreements by which he was undertaking a personal speculation and was not acting as a solicitor. It seems to me to be playing with words to say that when a solicitor assists litigation for the purpose of making a private profit out of the transaction, it can be described as a profit, if it be ultimately acquired, obtained in his professional capacity as solicitor, because from the very nature of the case he would have to account, if he were acting as solicitor, to his client. That view is recognized by s. 11 of the Attorneys' and Solicitors' Act, 1870, where it is said in terms that such an agreement is invalid. Lastly, I am unable to see that there was loss sustained by any neglect, omission or error. The loss was sustained because Mr. Haseldine financed and assisted in the action, thereby causing damage to Sterns—damage originally stated as special damage at the sum of 2811*l.*, and subsequently compromised for a considerably smaller sum. I am unable to regard that loss as caused by any error; it was caused by Mr. Haseldine entering into the agreements for the purposes recited in the agreements. He may or may not have mistaken the legal effect of what he was doing, but it is wrong to say that the loss was occasioned by any error; it was occasioned by the agreements.

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(1) [1921] 3 K. B. 327.
(2) [1927] 2 K. B. 311.
(3) [1892] 2 Q. B. 724.
(4) [1892] 2 Q. B. 728.
(5) (1775) 1 Cowp. 341, 343.
(6) [1892] 2 Q. B. 734.

Appeal allowed.

Solicitors for appellant: *William Charles Crocker.*
Solicitors for respondent: *Percy Haseldine & Co.*

J. S. H.

1933
Jan. 11,
12, 18.

STEAD HAZEL AND COMPANY *v.* COOPER.

Company—Liquidator—Signature of Contract as Liquidator—Performance of Contract without Disclaimer—Personal Liability—Presumption—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 267.

When a liquidator appointed by the Court performs a contract of the company without disclaimer or purports to make a new contract on its behalf, there is no presumption that he does so in his personal capacity, even though he does not describe himself as liquidator; and his position in this respect is not altered by s. 267 of the Companies Act, 1929, which gives him the right to disclaim any contract which he thinks onerous.

In re Anglo-Moravian Hungarian Junction Ry. Co. Ex parte Watkin (1875) 1 Ch. D. 130, 133, 134 followed.

Burt, Boulton & Hayward v. *Bull* [1895] 1 Q. B. 276 distinguished.

ACTION tried by Lawrence J. without a jury.

By a contract dated October 17, 1929, the plaintiffs agreed to sell, and a company named Trent Mill (1920), Ld., agreed to buy, bales of cotton in monthly instalments from November, 1929, to August, 1930, at prices to be fixed during the month of delivery at the buyers' option, cash before delivery. On March 12, 1930, an order was made for the winding-up of the company, and on May 6, 1930, the defendant was appointed liquidator by the Court. The defendant carried on the business of the company and requested the plaintiffs to continue to deliver under the contract. On June 20, 1930, he wrote the following letter to the brokers as representing the plaintiffs:—

"Dear Sirs,

Trent Mill (1920), Limited, in Liquidation.

Following the interview that Mr. Collings, the manager, had with you on Tuesday last, this opportunity serves to solicit your co-operation in conforming with the requirements and regulations in the proceedings herein, with regard to the taking up of cotton purchased—that is to say, that payment for such cotton and the charges to be made after actual delivery to me or my order.

Thanking you in anticipation,

Yours faithfully,
(Signed) D. COOPER,
Liquidator."

The plaintiffs complied with this request and they and the defendant accordingly continued to carry out the contract till August, 1930. On August 29 the brokers fixed the price for the deliveries outstanding, and on September 4 the defendant accepted that fixing of the price. The goods were not, however, accepted either by the company or by the defendant. The plaintiffs brought the present action for breach of contract against the defendant personally, alleging that he had neglected and/or refused to take delivery of the bales due for delivery in August, 1930. The defendant pleaded (inter alia) that he had acted solely as liquidator and/or agent for the company, as the plaintiffs at all material times well knew, and that he was under no liability whatever to the plaintiffs.

S. C. Vincent Addinsell for the plaintiffs.
Laski K.C. and *A. J. Hodgson* for the defendant.

Cur. adv. vult.

Jan. 18. LAWRENCE J. read the following judgment: This action is brought against the liquidator of Trent Mill (1920), Ld., in his personal capacity. He was appointed liquidator by the Court on May 6, 1930, at which date there was a contract outstanding under which the plaintiffs had agreed to deliver to the company certain bales of cotton in monthly instalments from November, 1929, to August, 1930, at prices to be fixed during the month of delivery at the buyers' option, cash before delivery. The defendant did not disclaim the contract, but on June 20, 1930, wrote to the brokers who had negotiated the contract asking them to arrange that payment should be made after actual delivery instead of before delivery, and to this request the plaintiffs acceded. The liquidator and the plaintiffs carried out the contract accordingly until the month of August, 1930. On August 29, 1930, the brokers fixed the price for the deliveries outstanding—namely, 100 bales—and the defendant on September 4, 1930, accepted this fixing of the price. The goods, however, were not accepted by the company or the defendant, and it is in respect of this failure to accept that this action is brought against the liquidator personally.

It is contended on behalf of the plaintiffs that the liquidator is personally liable, first, because he wrote the latter of June 20, 1930, by which it is said he undertook personal liability, and secondly, because he had the right to disclaim the contract under s. 267 of the Companies Act, 1929, and is therefore personally liable on any contract which he has not disclaimed.

In my opinion, neither of these contentions is sound, and I hold that the defendant is not personally liable.

Mr. Winstanley, a partner in the plaintiff firm, was the only witness called, but his evidence did not carry the case any further than the correspondence, since he never saw the defendant; and it is evident from the documents, and was admitted by Mr. Winstanley, that until March 14, 1932, no claim against the defendant personally was ever suggested, and that all the delivery notes, invoices, and receipts were sent to the company or to the defendant as liquidator. I see nothing in the letter of June 20, 1930, to suggest that the defendant intended to undertake a personal liability, and even if that letter and its acceptance by the plaintiffs constituted a new contract it was, in my judgment, a contract which purported to be a contract by the liquidator as agent for the company.

But it is contended that a liquidator appointed by the Court is in exactly the same position as a receiver and manager appointed by the Court, and that there is a presumption that when he performs a contract without disclaimer, or makes a new contract, he does so in his personal capacity, and that this presumption is not rebutted by his describing himself as liquidator. Reliance was principally placed upon *Burt, Boulton & Hayward* v. *Bull* (1), where it was held on the facts that a receiver and manager appointed by the Court who had given an order for goods in his own name, but describing himself as receiver and manager, was personally liable, because a receiver and

(1) [1895] 1 Q. B. 276.

manager of a company is not the agent of the company, and the words "receiver and manager" would therefore not suggest that the receiver was contracting as agent for the company.

In my view, the position of a liquidator appointed by the Court is not the same as that of a receiver and manager appointed by the Court. A liquidator is the agent of the company: *In re Anglo-Moravian Hungarian Junction Ry. Co. Ex parte Watkin* (1); a receiver is not: *Burt, Boulton & Hayward* v. *Bull.* (2) It is true that both are appointed and can be dismissed by the Court, and both control the assets of the company and may have to carry out the contracts of the company, but the liquidator acts for and in the interests of the company; whereas the receiver and manager acts for and in the interests of the debenture holders and not for the company. I think, therefore, that the description "liquidator" has not the same significance as the description "receiver and manager," and I find that the defendant did not purport to contract on his own behalf, nor did the plaintiffs give him credit on his own behalf.

I am also of opinion that a liquidator's position is not altered in regard to his personal liability by s. 267 of the Companies Act, 1929, which gives him the right to disclaim any contract which he thinks onerous. If he was not personally liable before this statutory provision was introduced it would require clear words to create such a personal liability, but there is none. On the contrary, the contrast between s. 54 of the Bankruptcy Act, 1914, which refers to the personal liability of the trustee in whom the assets of the bankrupt are by the statute vested, and s. 267 of the Companies Act, 1929, which does not refer to any personal liability of the liquidator in whom the assets of the company are not vested, goes to show that it was not intended, by conferring the right of disclaimer upon the liquidator, to affect his personal rights or liabilities. If such had been the intention, the statute could not have provided, as it does by s. 267, sub-s. 2, that the disclaimer

(1) 1 Ch. D. 130, 133, 134.

(2) [1895] 1 Q. B. 276.

1933

STEAD HAZEL & Co. *v.* COOPER.

shall not affect the rights or liabilities of any other person than the company, since the disclaimer would be affecting the personal liability of the liquidator by determining it.

I therefore give judgment for the defendant, with costs.

Solicitors for plaintiffs: *Layton & Co., Liverpool.*

Solicitors for defendant: *Hill, Dickinson & Co., for J. Arnold Brierley & Robinson, Oldham.*

J. R.

1933
Feb. 3.

LATHAM *v.* GOLDSBURY.

[1932. G. 1643.]

Bankruptcy—Debt "growing due"—Reputed Ownership—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 38 (*c*).

A tenant of licensed premises deposited with the brewers, his landlords, sums to secure the due payment of all amounts becoming due from him to them, whether for rent, goods supplied, or otherwise. He lodged the deposit receipts with his bank as security for his overdraft, which was also guaranteed by G. G. having paid off the overdraft, was subrogated to the rights of the bank, which thereafter held the deposit receipts on his behalf.

A receiving order in bankruptcy was made against the tenant on his own petition, and six days later the bank, for the first time, gave notice to the brewers of the charge on the receipts. The balance remaining due from the brewers to the tenant was claimed both by G. and by the trustee in bankruptcy, who alleged that it was a debt growing due to the bankrupt and in his possession, order or disposition at the date of the receiving order:—

Held, that the balance of the sums deposited with the brewers was a debt growing due to the bankrupt at the date of the receiving order, and that such a debt could be, and in this case was, in the possession, order or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner, under such circumstances that he was the reputed owner thereof.

INTERPLEADER ISSUE.

One Walter Drake was the tenant of certain licensed premises from Watney, Combe, Reid & Co., Ld., the brewers. He deposited with the brewers sums amounting in all to 750*l.* as security for the due performance of the covenants of the lease, and for the payment of all sums becoming due from him to them, whether for rent, goods supplied, or otherwise. The brewers gave deposit receipts for these sums, and these receipts were lodged by Drake with his bankers to secure an overdraft, which was also guaranteed by Thomas Arthur Goldsbury. No notice of charge was given at the time to the brewers by the bank.

On October 19, 1931, the bank overdraft was paid off by Mr. Goldsbury, who thereby became subrogated to the rights of the bank, which continued to hold the deposit receipts on his behalf.

On October 30, 1931, a receiving order in bankruptcy was made against Mr. Drake on his own petition, and six days later the bank, for the first time, gave notice of charge to the brewers in respect of the deposit receipts.

On March 8, 1932, the brewers applied out of the sum of 750*l.* in their hands the amount necessary to discharge Mr. Drake's liability to them, leaving a balance of 218*l.* 8*s.* 4*d.* due to the debtor. This sum was claimed both by Mr. Latham, the trustee in bankruptcy, under s. 38 (*c*) of the Bankruptcy Act, 1914 (1), as a debt "growing due" to the bankrupt at the date of the receiving order, and in his possession, order or disposition at that date in such circumstances that he was the reputed owner thereof, and by Mr. Goldsbury as the successor in title to the bank. Mr. Goldsbury commenced an action against the brewers, who interpleaded, and the present issue was ordered to be tried between Mr. Latham as claimant, and Mr. Goldsbury as defendant.

C. N. Tindale Davis for the claimant. This sum is within the order and disposition clause (s. 38 (*c*) of the Bankruptcy

(1) Sect. 38 of the Bankruptcy Act, 1914: "The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt . . . . shall comprise the following particulars:—. . . . (*c*) All goods being at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section."

Act, 1914), for it is a debt due or growing due to the bankrupt in the course of his trade or business. It is a debt due from Watney, Combe, Reid & Co., Ld., to the extent of so much of the sum of 750*l*. deposited with them as is not required for the purpose for which it was deposited. It is none the less a debt because it is not immediately ascertainable: see *Blakey* v. *Pendlebury's Trustees.* (1)

Being a debt, it is in the possession, order or disposition of the bankrupt, for apart from any charge, he is the only person able to dispose of it. It remains in his reputed ownership, in the sense in which that phrase is explained by Lord Selborne L.C. in *Ex parte Watkins.* (2)

The only method by which the debt can be prevented from passing to the trustee under s. 38 of the Bankruptcy Act, 1914, is by giving notice before the commencement of the bankruptcy of an assignment of the debt. In other words, where an opportunity of giving such notice exists, the fact of it not having been given to the book debtor is conclusive evidence of the consent of the true owner to the debt remaining in the reputed ownership of the bankrupt: see *Rutter* v. *Everett* (3); *In re Neal* (4); *In re Wethered.* (5)

C. Gallop for the defendant. The argument for the claimant is based on the assumption that the mere fact that there is a debt due to a person who subsequently goes bankrupt involves the conclusion that until notice has been given to the party liable the debt is in the possession, order or disposition of the bankrupt. That assumption is fallacious. The cases cited for the claimant were all cases of book debts, ascertainable as such from some document in the hands of the bankrupt. They could therefore be logically said to be in his possession, order or disposition. But there must be some definite ground for saying that the debt is in the possession, order or disposition of the bankrupt. In the present case, as the only effective documents, the deposit receipts, recording the transaction were physically handed over to the bank, there was nothing left from which it could be said that the debt was or remained in the possession, order or disposition of the debtor: see *Colonial Bank* v. *Whinney.* (1) If, as the claimant's argument means, all debts must be deemed, merely because they are debts, to be in the possession, order or disposition of the creditor, with reputation of ownership, then the words of the section are superfluous so far as relates to debts.

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(1) [1931] 2 Ch. 255.

(2) (1873) L. R. 8 Ch. 520, 528.

(3) [1895] 2 Ch. 872.

(4) [1914] 2 K. B. 910.

(5) [1926] Ch. 167.

Even if this debt was in the possession, order or disposition of Mr. Drake, though he had nothing which he could show to third parties to create a reputation of ownership, notice to the fund holder is not the only means, though it is one means, of removing the debt from his possession, order or disposition.

Secondly, this money was not a debt due or growing due to the bankrupt in the course of his trade. It was a fund of the bankrupt's own money, specifically lodged by him with the brewers to be held by them in specie. It was entered by them not in the ordinary ledger account but in a special deposit ledger account. The words of the section were intended only to deal with trading debts arising from some business transaction creating pecuniary liability. They should not be extended to cover a specific fund.

Finally, although *Blakey* v. *Pendlebury's Trustees* (2) decides that there may be a debt "growing due" though at the time of the bankruptcy it is uncertain whether it will ever mature into an actual debt, it is submitted that there cannot be any possession or reputed ownership at the commencement of the bankruptcy of a debt which may never become due and payable.

AVORY J. This case appeared at first sight to be a little complicated, but I have come to a clear conclusion on it, having had the advantage of the arguments of Mr. Tindale Davis and Mr. Gallop.

Mr. Drake, who was the licensee of a public-house under the brewers, Watney, Combe, Reid & Co., Ld., deposited

(1) (1886) 11 App. Cas. 426.

(2) [1931] 2 Ch. 255.

with the brewers sums amounting to 750*l.* as security for the due performance of the terms of his tenancy of the public-house. As a result of his trading with the brewers, after giving him credit for that 750*l.*, there was a balance of 218*l.* 8*s.* 4*d.* due from the brewers to the tenant Drake when the balance was struck on March 8, 1932.

Mr. Drake became bankrupt, and the act of bankruptcy, to which the bankruptcy dates back, was committed on October 30, 1931. The trustee in Mr. Drake's bankruptcy now claims that sum of 218*l.* 8*s.* 4*d.* as property divisible among his creditors. The whole question in issue before me turns on whether it is property divisible among his creditors within the meaning of s. 38 of the Bankruptcy Act, 1914; in other words, whether it was, on October 30, 1931, a debt either due or growing due to the bankrupt in the course of his trade or business. In the decision of the Court of Appeal in *Blakey* v. *Pendlebury's Trustees* (1) the meaning of those words "growing due" was carefully considered and adjudicated on. Lord Hanworth M.R., after referring to the old Act, which did not contain the words "growing due" said: "The word 'debt' seems to connote a contractual liability as between debtor and creditor, but 'growing due' is not an apt expression to cover a debt which is already a contractual obligation though the due date for payment has not yet been reached. It seems to intend something that in the course of the trade or business will ripen into a debt, though not a debt, and only in an inchoate state at the commencement of the bankruptcy."

That seems to me exactly to express the condition of this sum of 218*l.* 8*s.* 4*d.* at the date of the commencement of the bankruptcy. It was "in an inchoate state" which would ripen at the date for payment.

The only other question is whether this sum was in the reputed ownership of the bankrupt. I felt some doubt whether a debt "growing due" could be in reputed ownership, but I am satisfied that it may be by the words of Lord Selborne in *Ex parte Watkins* (2): "The doctrine of reputed ownership does not require any investigation into the actual state of knowledge or belief, either of all creditors, or of particular creditors, and still less of the outside world, who are no creditors at all, as to the position of particular goods. It is enough for the doctrine if those goods are in such a situation as to convey to the minds of those who know their situation the reputation of ownership, that reputation arising by the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject. It is not at all necessary to examine into the degree of actual knowledge which is possessed, but the Court must judge from the situation of the goods what inference as to the ownership might be legitimately drawn by those who knew the facts."

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(1) [1931] 2 Ch. 255, 264.

(2) L. R. 8 Ch. 520, 528.

Therefore I am satisfied that this sum of 218*l*. 8*s*. 4*d*. was a debt due or growing due which was in the possession, order or disposition of the bankrupt.

The question in the present issue is whether Mr. Goldsbury, who paid off Mr. Drake's bank overdraft, and was thereby subrogated to the rights of the bank, is entitled to this sum as against the trustee in bankruptcy. The short answer seems to me to be that no notice was given to the debtors by the bank or Mr. Goldsbury till after the title of the trustee had accrued. In those circumstances I think the trustee is entitled to this sum.

Judgment for the claimant.

Solicitors for claimant: *Kenneth Brown, Baker, Baker.*
Solicitor for defendant: *Lucien A. Isaacs.*

J. W. H.

C. C. A.
1932
Aug. 19.

THE KING *v.* JOHN PARKER.

Criminal Law—Defence—Reservation of at Police Court—Comment by Judge at Trial on Defendant's Silence—Regularity.

Three defendants were charged with an offence of robbery with violence. At the police court the first defendant on being asked the usual questions whether he wished to say anything in answer to the charge or to call witnesses replied that he reserved his defence and his evidence, but each of the other two defendants on being asked these questions disclosed his defence and his evidence, and they were all committed for trial. At the trial the judge in his summing-up observed that the first defendant, unlike the others, had not disclosed his defence and evidence at the police court, and that the police had not therefore had the same opportunity of inquiring into his case as into those of the other defendants :—

Held, that the observations did not constitute a misdirection, since, though they might not have been to the advantage of the first defendant, it was necessary to make them in the interest of the other two defendants.

Rex v. *Naylor* [1933] 1 K. B. 685 ; 23 Cr. App. R. 177 and *Rex* v. *Whitehead* [1929] 1 K. B. 99 distinguished.

Application for leave to appeal against conviction.

On April 25, 1932, Mr. Francis Neville Snook, the treasury officer of Lloyds Bank, Portsmouth, and Mr. Robert George Poor, a messenger of the bank, were taking a sum of 23,477*l.* in notes from the bank to the post office, the money being carried by Mr. Poor in a canvas bag. While they were on their way a motor-car was drawn up beside them containing several men, one of whom alighted, violently assaulted Mr. Poor, partly blinding him, seized the bag, and remounted the car, which was driven rapidly away.

In connection with the occurrence John Parker, the present applicant, Alfred George Hinds, and John Bennett were arrested and charged with robbery with violence.

On being brought before the police court the applicant and each of the other defendants was formally asked whether he wished to say anything, to call any witnesses, or to give evidence on his own behalf. The applicant returned negative answers to these questions, but the other two defendants disclosed their defences and called witnesses ; and they were all three committed for trial.

On July 11, 1932, the three defendants were tried together at Winchester Assizes before Avory J. and a jury. The applicant then set up an alibi as his main defence, alleging that at the time when the offence was committed he was not in Portsmouth but in London, and he called several witnesses is support of that defence.

Avory J., in summing up the case to the jury, said in regard to the course taken by the applicant: "Now, you will remember that this alibi, unlike those of the other two, was never disclosed when he was at the police court, and when he was there asked if he would give evidence or call any witnesses, he contented himself by saying that he would reserve them until the trial, and so in that way the police had no opportunity of making any inquiries into the truth of the evidence given by those witnesses."

The applicant was found guilty of the offence charged and was sentenced to five years' penal servitude and fifteen strokes of the cat.

H. W. Wickham for the applicant. When a defendant charged with an indictable offence is asked at the police court whether he wishes to say anything in answer to the charge or to call any witnesses, he is entitled, if he desires to do so, to answer these questions in the negative, and is under no obligation to disclose his defence or his evidence. By answering the questions in the negative he in no way prejudices his case. In the present case the observations of the learned judge in his summing-up pointing out that the applicant on being asked these questions at the police court had not disclosed his defence or his evidence were improper and amounted to a misdirection which should be held to invalidate the conviction: *Rex* v. *Naylor* (1); *Rex* v. *Whitehead*. (2) As the police had in fact inquired into the applicant's case, the statement of the judge that because the applicant had reserved his evidence the police had no opportunity of making inquiries into his case was inaccurate and constituted a further misdirection.

(1) [1933] 1 K. B. 685; 23 Cr. App. R. 177.

(2) [1929] 1 K. B. 99.

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PARKER.

T. J. O'Connor K.C. and *M. Campbell-Johnston* for the Crown. The comments made by the learned judge in his summing-up on the applicant's non-disclosure at the police court of his defence and evidence were proper and necessary. The cases relied upon on behalf of the applicant have no relation to the present case. In each of these cases the adverse comments made upon the defendant's silence were held to be improper because they went to show that it amounted to corroboration which was there required to substantiate the charge; but here there was abundant evidence apart from the applicant's silence to corroborate the charge. Moreover, here the judge could not have dealt fairly with the two other defendants who had disclosed their defences and evidence unless he had called attention to the difference between their cases and that of the applicant.

[HUMPHREYS J. mentioned the case of *Rex* v. *Feigenbaum.* (1)]

The Court (SWIFT, HUMPHREYS and GODDARD JJ.) refused the application.

SWIFT J. delivered the judgment of the Court as follows: The applicant was charged along with two other men with having committed the offence of robbery with violence. At the police court the applicant reserved his defence and evidence, but the other two defendants disclosed their defences and evidence. At the trial the applicant set up an alibi as his defence and called several witnesses in support of it. In the course of his summing-up Avory J. said: [His Lordship read the above-quoted observations, and continued :] It is said that that statement offended against the principle laid down in *Rex* v. *Naylor* (2) and amounted to a misdirection. In our view it did not. The facts in that case were very different from the facts in the present case. Here the judge was dealing with the defences of three separate defendants. He was pointing out to the jury that at the police court the applicant's two fellow defendants had disclosed their defences and evidence, while the applicant had reserved his defence and evidence, so that the police had not the same opportunity of inquiring into his case as into the cases of the other two defendants. He was bound in the interest of these two defendants to make clear the difference between the cases, and there was nothing in what he said that in any way infringed the principle involved in the authorities cited. There is no substance in this point, or in any of the other points taken by the applicant.

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(1) (1919) 14 Cr. App. R. 1.

(2) [1933] 1 K. B. 685; 23 Cr. App. R. 177.

Application refused.

Solicitors for applicant: *Peet & Manduell.*
Solicitor for prosecution: *Director of Public Prosecutions.*

J. R.

END OF VOL. I.

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